Supreme Court of the United States

October Term 1965—No. ~~12256~~ 105

HARRY KEYISHIAN, GEORGE HOCHFIELD, NEWTON GARVER, RALPH N. MAUD, and GEORGE E. STARBUCK,

Appellants,

vs.

BOARD OF REGENTS OF THE UNIVERSITY OF THE STATE OF NEW YORK, BOARD OF TRUSTEES OF THE STATE UNIVERSITY OF NEW YORK, STATE UNIVERSITY OF NEW YORK AT BUFFALO, SAMUEL R. GOULD, CLIFFORD C. FURNAS, J. LAWRENCE MURRAY, ARTHUR LEVITT, DEPARTMENT OF CIVIL SERVICE OF THE STATE OF NEW YORK, CIVIL SERVICE COMMISSION OF THE STATE OF NEW YORK, MARY GOODE KRONE, and ALEXANDER A. FALK,

Appellees.

ON DIRECT APPEAL FROM THE FINAL JUDGMENT OF A THREE JUDGE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF NEW YORK

MOTION TO DISMISS APPEAL BY ATTORNEY GENERAL OF THE STATE OF NEW YORK

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Preliminary Statement

This motion to dismiss is by the Attorney General of the State of New York on behalf of the appellees on whose behalf the Attorney General appears. It is made upon the ground that the statute challenged has been upheld by this Court; that accordingly there is no reason for this

Court to take jurisdiction of this appeal and the appeal should be dismissed.

The appeal insofar as the specific appellants are concerned is being dealt with by Counsel to the State University of New York, on behalf of appellees Board of Trustees of the State University of New York, the State University of New York at Buffalo, Samuel R. Gould, Clifford C. Furnas and J. Lawrence Murray.

The Action; The Decision of the Court Below

This action was brought by five persons associated with the State University of New York at Buffalo for judgment declaring unconstitutional § 105 of the Civil Service Law of the State of New York, §§ 3021 and 3022 of the Education Law of the State of New York, commonly known as the Feinberg Law, and the Rules of the Board of Regents adopted pursuant thereto.

The complaint asked that the case be referred to a Three-Judge District Court to hear and determine the action. It also asked for injunctive relief, which was not granted by any Court by which the case has been heard.

Hon. John O. Henderson, District Judge, denied plaintiffs' motion and dismissed the complaint (233 F. Supp. 752 [Sept. 1964]) upon this Court's decision in *Adler* v. *Board of Education,* 342 U. S. 485 (1952).

The United States Court of Appeals, Second Circuit, on May 3, 1965 (345 F. 2d 236), reversed and remanded, with instructions to the District Court to convene a Three-Judge District Court.

A Three-Judge United States District Court for the Western District of New York (Hon. Leonard P. Moore,

United States Circuit Judge, Hon. Harold P. Burke, United States Chief District Judge, Hon. John O. Henderson, District Judge), was convened. The Court, after argument and briefs, on January 5, 1966, unanimously found constitutional the statutes and Rules of the Board of Regents attacked, as well as the procedures under these statutes and the rules in effect of State University of New York at Buffalo. The Court gave judgment for defendants accordingly and denied plaintiffs all the relief requested by them.

Circuit Judge Moore wrote an extensive opinion for the Court. (The opinion is not yet reported; copy attached as Appendix A to this brief.)

The Court's opinion is a model of thoroughness. *Seriatim* it considers every argument made by appellants. One after another it examines each of the cases cited by appellants and demonstrates the complete inapplicability to the Feinberg Law.

The Statutes Involved

The statutes involved are set forth in full as Appendix C to this brief.

Here we set forth their essence.

The Feinberg Law enacted in 1949 was designed to eliminate from the State's school system as teachers, persons who advocate the overthrow of the government by force, violence or unlawful means.

The law itself added a section, § 3022, to the Education Law. The first subdivision of the section directed the Board of Regents to adopt rules and regulations implementing pre-existing provisions of the Education Law and the Civil Service Law which disqualified for employment in

the school system or in the civil service of the state or in any school, college or educational institution by reason of advocacy of the overthrow of the government by force, violence or unlawful means, or treasonable or seditious utterances or acts.

The second subdivision of the section directs the Board of Regents, after inquiry, notice and hearing, to list organizations which advocate the overthrow of the government by force, violence or other unlawful means, and to provide by rules that membership in such organization is *prima facie* evidence of disqualification for employment in the school system.

In 1953 § 3022 was amended to add to schools within its coverage any college or other institutions of higher education owned and operated by the State (L. 1953, ch. 681). Section 12-a of the Civil Service Law (now § 105), which subdivision 1 of Education Law § 3022 implemented, had since 1939 included state colleges within its coverage.

On September 24, 1953, pursuant to § 3022 the Regents, after extensive hearings, listed the Communist Party of the United States and the Communist Party of the State of New York.

In 1958 § 12-a of the Civil Service Law was renumbered § 105 (L. 1958, ch. 790). In the same year § 23-a of the Civil Service Law (which is the same as § 3021 of the Education Law) was transferred to § 105 as paragraph 3 thereof. Both provide for removal from the civil service of the State (Civil Service Law § 105[3]) or from employment in the schools (Education Law § 3021) for treasonable or seditious utterances or acts. In 1958 there was also added to Civil Service Law § 105, subdivision 3, a provision defining "treasonable" and "seditious" as being the definition of these words in the Penal Law.

By chapter 503, section 1, of the Laws of 1958, the New York State Legislature took cognizance of the listing by the Regents pursuant to Education Law § 3022 of the Communist Party of the United States of America and of the State of New York and amended subdivision 1 (c) of § 12-a of the Civil Service Law (before the section was renumbered as § 105) to make membership in such organizations *prima facie* evidence of disqualification for office or position in the civil service.

ARGUMENT

The case presents no substantial federal question.

This Court upheld the statute attacked in *Adler* v. *Board of Education*, 342 U. S. 485.[1]

The Court has continued to hold as it did in *Adler* that there is no question of the power of a State to safeguard the public service from disloyalty.

No decision of the Court since *Adler* suggests that the Feinberg Law is other than a reasonable exercise of that power.

A.

The Feinberg Law was upheld by the Supreme Court of the United States in *Adler* v. *Board of Education*, 342 U. S. 485.

When the Feinberg Law was enacted, three litigations were brought approximately at the same time attacking its constitutionality. Ultimately, the law was upheld by

[1] The opinion of this Court and of the New York Court of Appeals (*sub nom Thompson* v. *Wallin*) are reproduced as Appendix B to this Brief.

this Court in *Adler* v. *Board of Education*, 342 U. S. 485.[2] In the complaints and in the briefs in the first Feinberg litigation in the Appellate Courts of New York and in this Court, every challenge to the constitutionality of the statute and every argument of unconstitutionality which appellants make here were made. Appellants make no argument, imagnative as counsel has striven to be, which was not made there, separately and cumulatively, by the numerous counsel who supported the attack. If conceivably any brief omitted an argument of unconstitutionality, another brief or briefs made it.

In this Court in addition to the brief for appellants, the American Civil Liberties Union filed a brief in their behalf. Between the two they argued that the law and Regents' Rules abridge freedom of speech and assembly (Appellant's Br., Point I); that the question before the Court is "whether the restriction imposed on government employees has reasonable relation to the public service" (*ibid.*); that the presumption created by the law is unreasonable and denies due process (Appellant's Br., Point II); that the law and the Regents' Rules are void because of vagueness (Appellant's Br., Point III); that the word "subversive" and the words "treasonable" and "seditious" in the law are vague (Appellant's Br., Point III; America Civil Liberties Union Br., Point I[4]); that the law and the Rules and the Commissioner's Memorandum invade the "spirit of free intellect" (American Civil Liberties Union Br., Point I[1]); that the law is in the nature of a bill of attainder and an *ex post facto* law (*ibid.*

[2] Of the other two actions, one of the appeals to this Court was abandoned; pursuit of the appeal in the other case was delayed and the New York Court of Appeals decision in that case was later affirmed by this Court (342 U. S. 951) on the basis of its decision in *Adler*.

Point I[2]); that the law constitutes guilt by association (*ibid.* Point I[3]); that the law adversely affects freedom of teaching and learning (*ibid.* Point I[6]); that the law amounts to a dragnet which may enmesh anyone "who * * * shows any interest in the form of government of other countries" (American Civil Liberties Union Br., p. 25); etc.

Appellants here, searching for something on which to argue that the *Adler* decision is not controlling, contend that Education Law § 3022 now covers academic personnel of the colleges by an amendment of 1953, and suggest that the law might have been relevant to protect children from teachers whom the statute would bar, but not college age students. The answer is that Civil Service Law § 12-a (now § 105), in which the Supreme Court in the *Adler* case found "no constitutional infirmity", applied when it was upheld in *Adler* to

> "any person * * * in the public service * * * as * * * teachers * * * in a state normal school or college, or any other state educational institution."

The reference in the *Adler* case to children in the public schools was because the Feinberg Law, implementing Civil Service Law, § 12-a, sparked the litigation and it enacted a procedure for employees in the public school system.

Moreover, the arguments on behalf of plaintiffs in the *Adler* case were directed to the curb by the statute on teachers *qua* teachers and not especially to those whom they taught. We quote from the American Civil Liberties Union brief as *amicus* in this Court, page 6:

> "*Scope of the Argument*
>
> The Amicus considers the Feinberg Law and its implementary rules and guides from the point of view of their effect upon civil liberties and academic freedom within the public schools, particularly in regard

to their effect upon teachers, students and the public school system, and *specifically upon teachers, who are the principal subjects of the Feinberg Law* and the administrative provisions thereunder." (Italics ours.)

This Court's opinion in the Adler case.

The Supreme Court characterized the *Adler* action as one for declaratory judgment that Civil Service Law § 12-a (now § 105), as implemented by the Feinberg Law, "be declared unconstitutional" (342 U. S. 485, at p. 491). The challenge was to "the Feinberg Law and the Rules promulgated thereunder" (*ibid.*).

The Court rejected the argument that the law and Rules constituted a deprivation of the right to free speech or assembly (342 U. S., at p. 492). It held that those whom it might affect would be denied appointment to or employment in the school system of the State "because first, of their advocacy of the overthrow of the government by force or violence, and secondly, by unexplained membership in an organization found by the school authorities, after notice and hearing, to teach and advocate the overthrow of the government by force or violence and known by such persons to have such purpose" (*ibid.*).

The constitutionality of denial of employment in the State school system for advocacy of overthrow of the government by force, and for membership in an organization proscribed in the law, was upheld because, as the Court said:

"We know of no rule, constitutional or otherwise, that prevents the state when determining the fitness and loyalty of such persons, from considering the organizations and persons with whom they associate. • • • Certainly such limitation is not one that the state may not make in the exercise of its police power to protect

> the schools from pollution and thereby to defend its own existence." (*ibid.* p. 493).

As appellants do here, so in the *Adler* case appellants argued that the presumption from membership in the proscribed organization bore no relation to qualification for employment. To this the Court said:

> "We do not agree. * * * We cannot say that such a finding is contrary to fact or that 'generality of experience' points to a different conclusion." (*ibid.* pp. 494, 495.)

Directing itself to the charge that the word "subversive", as used in subdivision 2 of § 3022 of the Education Law, was vague and indefinite, the Court said:

> "* * * the word has a very definite meaning, namely, an organization that teaches and advocates the overthrow of the government by force or violence." (*ibid.* p. 496.)

The conclusion by the Supreme Court was:

> "We find no constitutional infirmity in § 12-a of the Civil Service Law of New York or in the Feinberg Law which implemented it, * * *" (*ibid.* p. 496).

While the Court did not in *Adler* pass specifically upon § 3021 of the Education Law because it had not been attacked in the State Courts (342 U. S. at 489), the Court seemingly did not find it necessary to pass upon the constitutionality of the section in order to uphold § 3022, the Feinberg Law. Otherwise the Court would not have upheld § 3022 until § 3021 was properly before it.

As to the provisions of § 3021 that persons shall be removable from employment in the school system for treasonable or seditious utterances or acts, *People* v. *Gitlow*, 268 U. S. 652 [1925] affirming 234 N. Y. 132, affirming 195 App.

Div. 773, upheld conviction under the Penal Law provision which the counterpart of § 3021 (Civil Service Law § 105 [3]) incorporates for definition of "sedition".

There is thus no question of the constitutionality of § 3021 as written. It is not being applied at this time to anyone, nor has it been. Not by the State University. Not by the Regents. Nor has it been since 1949, when the Feinberg Law was enacted.

As to the contention that section 3022 was not considered in its application to university faculty in the *Adler* case, it is the fact, on the contrary, that the entire litigation which culminated in this Court's decision in *Adler* was the challenge to Civil Service Law § 12-a (as implemented by Education Law § 3022). And § 12-a (now § 105) has since 1939 been applicable to persons employed "in a state normal school or college or any other state educational institution". This Court's holding in *Adler* was that it found "no constitutional infirmity" "in § 12-a of the Civil Service Law * * * or in the Feinberg Law which implemented it" (342 U. S. at p. 496). As we have observed, *supra*, there is moreover no reason to draw distinction between teachers in universities and teachers in other schools in respect to the constitutionality of this law which applies to *teachers*—not to their students.

In accordance with its undeviating principle (*Seagram, et al.* v. *Hostetter, et al.*, ____ U. S. ____, April 19, 1966; *NAACP* v. *Button*, 371 U. S. 415, 432 [1963]), this Court in *Adler* accepted the construction of the Feinberg Law by the highest Court of New York as to the procedural due process provided by the Feinberg Law (342 U. S. at p. 495-6, quoting at some length on this subject the opinion of the New York Court of Appeals, 301 N. Y. at p. 494).

That construction of course stands, as the Court below said. The due process which the New York Court of Appeals held that law afforded—it has always afforded and affords today.

Fourteen years have passed since the Feinberg Law was upheld by this Court, 14 years of practical application and construction of the law by those who administer it. In those 14 years there has been no instance of due process having been denied under it, no instance of its application or use to curb "innocent activity [or] • • • belief • • • [or] speech" (Appellants' brief, p. 25). Appellants do not suggest that there has.

This is the simple demonstration that the Feinberg Law is what this Court and the Court of Appeals of New York in *Adler* said it is and does. Not what appellants here (as did appellants in the first litigation) theorize it is and does.

B.

Decisions of this Court since *Adler*.

The Court below in its opinion effectively analyzed all of the decisions of this Court since *Adler* which appellants invoke. All dealt with statutes totally different from the Feinberg Law. They struck down (or upheld) the particular statutes involved. What the Court said in each case was directed to the statute before it in the case. (This is also true of *Elfbrandt* v. *Russell*, decided by this Court April 18, 1966, subsequent to the decision below.)

Not one opinion since *Adler* has been critical of the decision. Indeed, where cited (*e.g.*, *Cramp* v. *Board of Public Instruction*, 368 U. S. 278, 288 [1961]) it has been as a viable decision for the viable principle of the *Adler* case.

CONCLUSION

The appeal should be dismissed upon the ground that it does not warrant the Court taking jurisdiction, or the decision below should be affirmed.

Dated: May 13, 1966.

Respectfully submitted,

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APPENDICES

Appendix A

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

HARRY KEYISHIAN, GEORGE HOCHFIELD, NEWTON GARVER, RALPH M. MAUD, and GEORGE E. STARBUCK,

Plaintiffs,

v.

BOARD OF REGENTS OF THE UNIVERSITY OF THE STATE OF NEW YORK, BOARD OF TRUSTEES OF THE STATE UNIVERSITY OF NEW YORK, STATE UNIVERSITY OF NEW YORK AT BUFFALO, SAMUEL B. GOULD, CLIFFORD C. FURNAS, J. LAWRENCE MURRAY, ARTHUR LEVITT, DEPARTMENT OF CIVIL SERVICE OF THE STATE OF NEW YORK, CIVIL SERVICE COMMISSION OF THE STATE OF NEW YORK, MARY GOODE KRONE, and ALEXANDER A. FALK,

Defendants.

Civil Action File No. 10,994.

Before: Moore, *U. S. C. J.*, Burke, *Ch. J.* and Henderson, *U. S. D. J.*

Appearances:

Richard Lipsitz, of Lipsitz, Green and Fahringer, Buffalo, New York (Rosario J. DiLorenzo on the brief), for plaintiffs.

John C. Crary, Jr. (Richard A. Foster and David L. Segal on the brief), for defendants Board of Trustees—State University of New York, State University of New York at Buffalo, Clifford C. Furnas, Samuel B. Gould, and J. Lawrence Murray.

Ruth Kessler Toch (Louis J. Lefkowitz, Attorney General of the State of New York, on the brief), for defendants Board of Regents of the University of the State of New York, Department of Civil Service of the State of New York, Civil Service Commission of the State of New York, Mary Goode Krone, and Alexander A. Falk.

MOORE, *C. J.*

This suit challenges the constitutionality of Sections 3021 and 3022 of the New York Education Law, Section 105 of the New York Civil Service Law, Section 244 of Article XVIII of the Rules of the Board of Regents of the State of New York, and the procedures used under these various statutes and regulations. Section 105 of the Civil Service Law and Sections 3021 and 3022 of the Education Law, as they are now in effect, are set forth in the margin.[1]

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[1] *Civil Service Law*

§ 105. *Subversive activities: disqualification.*

1. Ineligibility of persons advocating overthrow of government by force or unlawful means. No person shall be appointed to any office or position in the service of the state or of any civil division thereof, nor shall any person employed in any such office or position be continued in such employment, nor shall any person be employed in the public service as superintendent, principal or teacher in a public school or academy or in a state college or any other state educational institution who:

(a) by word of mouth or writing wilfully and deliberately advocates, advises or teaches the doctrine that the government of the United States or of any state or of any political subdivision thereof should be overthrown or overturned by force, violence or any unlawful means; or

(Footnote continued on following page)

Section 244 of Article XVIII of the Rules of the Board of Regents, promulgated after the enactment of Section 3022 of the Education Law, provides that school authorities

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(Footnote continued from preceding page)

(b) prints, publishes, edits, issues or sells any book, paper, document or written or printed matter in any form, containing or advocating, advising or teaching the doctrine that the government of the United States or of any state or of any political subdivision thereof should be overthrown by force, violence or any unlawful means, and who advocates, advises, teaches, or embraces the duty, necessity or propriety of adopting the doctrine contained therein; or

(c) organizes or helps to organize or become a member of any society or group of persons which teaches or advocates that the government of the United States or of any state or of any political subdivision thereof shall be overthrown by force or violence, or by any unlawful means.

For the purpose of this section, membership in the communist party of the United States of America or the communist party of the state of New York shall constitute *prima facie* evidence of disqualification for appointment to or retention in any office or position in the service of the state or of any city or civil division thereof.

2. A person dismissed or declared ineligible pursuant to this section may within four months of such dismissal or declaration of ineligibility be entitled to petition for an order to show cause signed by a justice of the supreme court, why a hearing on such charges should not be had. Until the final judgment on said hearing is entered, the order to show cause shall stay the effect of any order of dismissal or ineligibility based on the provisions of this section; provided, however, that during such stay a person so dismissed shall be suspended without pay, and if the final determination shall be in his favor he shall be restored to his position with pay for the period of such suspension less the amount of compensation which he may have earned in any other employment or occupation and any unemployment insurance benefits he may have received during such period. The hearing shall consist of the taking of testimony in open court with opportunity for cross examination. The burden of sustaining the validity of the order of dismissal or ineligibility by a fair preponderance of the credible evidence shall be upon the person making such dismissal or ordr of ineligibility.

shall put into effect certain procedures for disqualification and removal of employees who violate Section 3021 of the Education Law or Section 105 of the Civil Service Law.

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3. Removal for treasonable or seditious acts or utterances. A person in the civil service of the state or of any civil division thereof shall be removable therefrom for the utterance of any treasonable or seditious word or words or the doing of any treasonable or seditious act or acts while holding such position. For the purpose of this subdivision, a treasonable word or act shall mean "treason", as defined in the penal law; a seditious word or act shall mean "criminal anarchy" as defined in the penal law.

Education Law

§ 3021. *Removal of superintendents, teachers and employees for treasonable or seditious acts or utterances.*

A person employed as superintendent of schools, teacher or employee in the public schools, in any city or school district of the state, shall be removed from such position for the utterance of any treasonable or seditious word or words or the doing of any treasonable or seditious act or acts while holding such position.

§ 3022. *Elimination of subversive persons from the public school system.*

1. The board of regents shall adopt, promulgate, and enforce rules and regulations for the disqualification or removal of superintendents of schools, teachers or employees in the public schools in any city or school district of the state and the faculty members *and all other personnel and employees of any college or other institution of higher education owned and operated by the state or any subdivision thereof* who violate the provisions of sections three thousand twenty-one of this article or who are ineligible for appointment to or retention in any office or position in such public schools or such institutions of higher education on any of the grounds set forth in section twelve-a of the civil service law and shall provide therein appropriate methods and procedure for the enforcement of such sections of this article and the civil service law.

2. The board of regents shall, after inquiry, and after such notice and hearing as may be appropriate, make a listing of organizations which it finds to be subversive in that they advocate, advise, teach or embrace the doctrine that the government of the United States or of any state or of any political

(Footnote continued on following page)

Before appointment of an employee, the nominating official shall inquire of his former employers and of others whether he is known to have violated the statutory provisions, and no person found to have violated the statutes shall be eligible for employment. Each year school authorities shall prepare a report on each employee, stating whether there is any evidence, including membership in an organization listed as subversive by the Board of Regents, indicating that the employee has violated the statutes. If there is

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(Footnote continued from preceding page)

subdivision thereof shall be overthrown or overturned by force, violence or any unlawful means, or that they advocate, advise, teach or embrace the duty, necessity or propriety of adopting any such doctrine, as set forth in section twelve-a of the civil service law. Such listings may be amended and revised from time to time. The board, in making such inquiry, may utilize any similar listings or designations promulgated by any federal agency or authority authorized by federal law, regulation or executive order, and for the purposes of such inquiry, the board may request and receive from such federal agencies or authorities any supporting material or evidence that may be made available to it. The board of regents shall provide in the rules and regulations required by subdivision one hereof that membership in any such organization included in such listing made by it shall constitute *prima facie* evidence of disqualification for appointment to or retention in any office or position in the public schools of the state.

3. The board of regents shall annually, on or before the fifteenth day of February, by separate report, render to the legislature, a full statement of measures taken by it for the enforcement of such provisions of law and to require compliance therewith. Such reports shall contain a description of surveys made by the board of regents, from time to time, as may be appropriate, to ascertain the extent to which such provisions of law have been enforced in the city and school districts of the state.

Section 12-a of the Civil Service Law, referred to in Section 3022 of the Education Law, now appears as Section 105(1) and (2) of the Civil Service Law, N. Y. Sess. Laws 1958, ch. 790, § 105.

such evidence, the reporting official is to recommend the employee's dismissal, and within 90 days after the recommendation has been submitted, the school authorities must either prefer formal charges or reject the recommendation. If charges are preferred against persons serving on probation or having tenure, statutory dismissal procedures shall be followed. "In proceedings against persons serving under contract and not under the provisions of a tenure law, the school authorities shall conduct such hearings * * * as they deem the exigencies warrant, before taking final action on dismissal. In all cases, all rights to a fair trial, representation by counsel and appeal or court review as provided by statute or the Constitution shall be scrupulously observed."

The State University of New York at Buffalo, attempting to comply with the Regents' rules, distributed to all members of the academic staff a booklet containing the Regents' rules and the underlying statutes, and required each faculty member to sign a certificate (the "Feinberg certificate") declaring that he had read the Regents' rules; that the rules and the statutes cited therein constituted terms of his employment; and that he was not now a member of the Communist Party and if he ever had been, he had communicated that fact to the president of the university.

Four of the five plaintiffs in the present action—Keyishian, Hochfield, Garver, and Maud, all under term appointments to the academic staff of the University—declined to sign the certificates, and were notified that if they did not sign as requested their terms would not be renewed on grounds of insubordination. Keyishian's term has ended and his appointment has not been renewed. The terms of two of the other three have not expired and they remain in their former positions. They have been informed that dismissal proceedings will not be started against them until

the validity of the statutes, rules, and procedures is determined in the present suit. Maud accepted a position after his term expired in September 1965, again subject to the determination of the present suit, but has resigned from the university.

The fifth plaintiff, Starbuck, was appointed on September 1, 1963, to a one-year term as a specialist in acquisitions for the library. After starting work he was required to fill out a form, one question of which asked: "Have you ever advised or taught or were you ever a member of any society or group of persons which taught or advocated the doctrine that the government of the United States or of any political subdivision thereof should be overthrown or overturned by force, violence, or any unlawful means?" He refused to answer and was dismissed from his appointment on June 18, 1964.

On July 8, 1964, the plaintiffs brought a class action against a large part of the educational hierarchy of the State of New York, seeking an injunction against enforcement of the civil statutes concerning employment of subversives and of the regulations and procedures used to implement those statutes. The District Court held that no substantial federal question was raised, and accordingly refused to refer the case to a three-judge district court. 233 F. Supp. 752 (W. D. N. Y., 1964.) The Court of Appeals for the Second Circuit reversed and directed that the case be heard before a three-judge court. 345 F. 2d 236 (2 Cir., 1965).

I. *The Constitutionality of the State's Objective.*

The plaintiffs argue in part that the complex of laws, regulations, and procedures under attack has no constitutionally valid objective—that they infringe upon freedom

of expression without being justified by any legitimate state interest.

The Supreme Court in the *Adler* case, considering statutes the predecessors of the ones now in question, described the importance of the state interest in preventing the use of the educational system as a platform for urging students to overthrow government by violent means:

> "A teacher works in a sensitive area in a schoolroom. There he shapes the attitude of young minds towards the society in which they live. In this, the state has a vital concern. It must preserve the integrity of the schools. That the school authorities have the right and the duty to screen the officials, teachers, and employees as to their fitness to maintain the integrity of the schools as a part of ordered society, cannot be doubted."

Adler v. *Board of Education*, 342 U. S. 485, 493 (1952).

The Supreme Court has not changed its recognition of the importance of this state interest in recent cases. In 1958, it quoted the above language from *Adler* with approval, in upholding the dismissal for "incompetency" of a Pennsylvania school teacher who refused to answer a question as to his activities in the Communist Party. *Beilan* v. *Board of Public Education*, 357 U. S. 399 (1958). In *Barenblatt* v. *United States*, 360 U. S. 109 (1959), the Court upheld the contempt conviction of a former teaching fellow at the University of Michigan, based on his refusal to answer questions of a congressional committee as to his past and present membership in the Communist party. The Court indicated that Congress had a legitimate interest in "inquiring into the extent to which the Communist Party has succeeded in infiltrating into our universities * * * persons and groups committed to furthering the objective of overthrow." 360 U. S. at 129. In *Cramp* v. *Board of*

Public Instruction, 368 U. S. 278 (1961), the Court struck down as unconstitutionally vague a Florida statute requiring state employees to swear that they had never lent their "aid, support, advice, counsel, or influence to the Communist Party"; but the Court did not "question the power of a State to safeguard the public service from disloyalty." 368 U. S. at 288. Nor does the recent decision of *Baggett* v. *Bullitt,* 377 U. S. 360 (1964), cast any doubt upon the power of a state to act to prevent the incitement of violent overthrow on university campuses.

The plaintiffs argue that the legitimate state objective recognized by the Court in *Adler* is not present here, since the teachers here hold positions at universities rather than at public schools. The argument appears to be based upon the comparative maturity of mind of the university student, which entitles him to the privilege of exposure to conflicting political philosophies. But as the American Association of University Professors wrote in their *amicus* brief in *Barenblatt, supra,* a case involving a university teacher, "The claims of academic freedom cannot be asserted unqualifiedly. The social interest it embodies is but one of a larger situation, within which the interest in national self-preservation * * * also prominently appear[s]." Brief, p. 24. It would not be constitutional to prevent the *teaching* of Communist philosophy at the university level; but it would be dangerously anomalous to proscribe the advocacy of violent overthrow of government in all parts of the United States, see *Dennis* v. *United States,* 341 U. S. 494 (1951), except in the breeding-grounds of the future leaders of the nation. The interest in national self-preservation—"the ultimate value of any society," *Dennis* at 509—applies to the university campus as well as to the rest of our society.

II. *The Constitutionality of the Means Used to Attain the State's Objective.*

The plaintiffs maintain that even if the statutes and regulations under attack assert a legitimate state objective, they do so in a manner which unduly restricts other interests protected by the Constitution. The plaintiffs invoke a variety of constitutional clauses in support of their position.

A. The Ex Post Facto Clause.

An *ex post facto* law is "one which imposes a punishment for an act which was not punishable at the time it was committed; or imposes additional punishment to that then prescribed; or changes the rules of evidence by which less or different testimony is sufficient to convict than was then required." *Cummings* v. *Missouri*, 71 U. S. 277, 325-26 (1867).

In the present case, the plaintiffs either have been dismissed or are threatened with dismissal for failure to answer questions put to them under procedures designed to implement § 3022 of the Education Law, which was made applicable to colleges in 1953. Before being dismissed or threatened with dismissal, the plaintiffs were repeatedly told the purpose of the questions, the statutory basis for the questions, and the possibility that dismissal proceedings would be started if they failed to answer the questions. The proscription of their conduct preceded the conduct itself, so that the *ex post facto* clause does not apply. See *Garner* v. *Board of Public Works*, 341 U. S. 716, 721 (1951), in which the Court rejected an argument that dismissal of municipal employees for failure to take an oath was *ex post facto* punishment, with the observation that the activity covered by the oath had been proscribed years before the employees were asked to take the oath.

B. The Bill of Attainder Clause.

"Legislative acts, no matter what their form, that apply either to named individuals or to easily ascertainable members of a group in such a way as to inflict punishment of them without a judicial trial are bills of attainder prohibited by the Constitution." *United States* v. *Lovett,* 328 U. S. 303, 315-16 (1946). The plaintiffs contend that Section 3022 of the Education Law, coupled with the Regents' regulations under that section and Section 105(1)(c) of the Civil Service Law, constitute a bill of attainder, since these provisions single out as ineligible for employment in state schools members of the Communist Party of New York and of the Communist Party of the United States. A similar argument was made and rejected in the *Adler* case.

The plaintiffs put particular reliance on *United States* v. *Brown,* 381 U. S. 437 (1965), in which the Court held unconstitutional as a bill of attainder a statute making it criminal for anyone "who is or has been a member of the Communist Party" to serve as an officer of a labor union within five years of the termination of his membership in the Communist Party. However, the statute attacked in the *Brown* case differs fundamentally from the statutes and regulations challenged here in the nature of the part played by the legislature in determining the underlying facts from which adverse consequences would follow. Assuming without deciding that dismissal from state employment can constitute "punishment"—a question left open in *Garner,* 241 U. S. 716 at 721 (1951) and not touched upon in *Brown*—the bill of attainder clause only forbids "punishment" imposed by a legislature as a result of "trial by legislature." *Brown,* 381 U. S. at 442. It is the unfairness of trial by a large body "peculiarly susceptible to popular clamor," 1 Cooley, Constitutional Limitations,

536-37 (8th ed. 1927) that underlies the bill of attainder clause. The court in *Brown* faced a statute involving just such a "trial by legislature"—a statute which specified the Communist Party by name, and made it a crime—automatically and incontestably—for a Party member to hold union office.

In the present case, disqualification from employment in the state schools did not follow automatically from a legislative determination that the Communist Party was a bad organization. Section 3022 of the Education Law provided that the Board of Regents shall, after full notice and hearing, make a list of organizations which it finds advocate the doctrine that government should be overthrown by force, violence, or other unlawful means. It was only after extensive hearings that the Board of Regents lists two organizations under Section 3022; the Communist Party of New York and the Communist Party of the United States. These determinations were subject to judicial review under Article 78 of the Civil Practice Act, now Article 78 of the Civil Practice Law and Rules. *Thompson* v. *Wallin*, 301 N. Y. 476, 493, 95 N. E. 2d 806 (1950), *aff'd subnom. Adler* v. *Board of Education*, 342 U. S. 485 (1952).

Section 105(1)(c) of the Civil Service Law, which makes membership in either the Communist Party of New York or that of the United States "*prima facie* evidence" of disqualification for the state civil service, was based not on an original determination by the state legislature of the aims of the Communist Party, but upon the findings of the Board of Regents under Section 3022 of the Education Law. The preamble to the amendment incorporating the reference to the two parties makes clear that the purpose of the reference was to bring Section 105 into harmony with

the determinations of the Board of Regents under Section 3022. N. Y. Sess. Laws 1958, c. 503, § 1.[2]

Again unlike the statute struck down in *Brown*, Sections 105(1)(c) of the Civil Service Law and 3022 of the Education Law make membership in the Communist Party only *prima facie* evidence of disqualification" from state employment. The presumption is rebuttable; at a hearing, the employee "may deny (a) membership; (b) that the organization advocates the overthrow of the government by force; and (c) that he has knowledge of such advocacy." *Lederman* v. *Board of Education*, 276 App. Div. 527, 530, 96

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[2] The text of the preamble is as follows:

"*Declaration of legislative intent.*

The legislature takes cognizance that section three thousand twenty-two of the education law makes provision for the implementation and enforcement of section twelve-a of the civil service law [now Section 105 of the Civil Service Law] with respect to the elimination of subversive persons from the public school system; that such section three thousand twenty-two authorizes the board of regents, after notice and hearing, to list

'organizations which it finds to be subversive in that they advocate, advise, teach or embrace the doctrine that the government of the United States or of any state or of any political subdivision thereof shall be overthrown or overturned by force, violence or any unlawful means, or that they advocate, advise, teach or embrace the duty, necessity or propriety of adopting any such doctrine, as set forth in section twelve-a of the civil service law';

that the board of regents, after notice and hearing, has so listed the communist party of the United States of America and the communist party of the state of New York; and that pursuant to such section three thousand twenty-two and rules and regulations adopted thereunder membership in either such organization constitutes *prima facie* evidence of disqualification for appointment to or retention in any office or position in the public schools of the state. It is the intent of the legislature to apply to all officers and employees subject to section twelve-a of the civil service law the same provision that membership in either of such organizations shall constitute *prima face* evidence of disqualification for appointment or continued employment."

N. Y. S. 2d 466, 470 (2d Dept. 1950), *aff'd sub nom. Thompson* v. *Wallin*, 301 N. Y. 476, 95 N. E. 2d 806 (1950), *aff'd sub nom. Adler* v. *Board of Education*, 342 U. S. 485 (1952). As the New York Court of Appeals stated in *Thompson* v. *Wallin*:

> "The phrase '*prima facie* evidence of disqualification' * * * imports a hearing at which one who seeks appointment to or retention in a public school position shall be afforded an opportunity to present substantial evidence contrary to the *prima facie* evidence * * * Once such contrary evidence has been received, however, the official who made the order of ineligibility has thereafter the burden of sustaining the validity of that order by a fair preponderance of the evidence."

301 N. Y. 476 at 494, 95 N. E. 2d 806 at 814-15. See also *Hughes* v. *Board of Higher Education*, 309 N. Y. 319, 130 N. E. 2d 638 (1955).

The disqualification of a teacher under these laws, in short, is not the result of a "legislative trial". The legislature in the first instance—in enacting Section 3022 of the Education Law—did nothing more than, in the language of *Brown*, 381 U. S. at 450, "set forth a generally applicable rule" as to the characteristics of organizations, membership in which should be evidence of disqualification. The determination of what organizations possessed those characteristics was left to an administrative body, to be made after notice, hearing, and opportunity for judicial review. The case closely resembles *Communist Party* v. *Subversive Activities Control Board*, 367 U. S. 1 (1961), in which the Court holding that the Subversive Activities Control Act of 1950 was not a bill of attainder, stressed the "crucial constitutional significance of what Congress did when it rejected the approach of outlawing the Party by name and accepted instead a statutory program regulating not enumerated organizations but designated activities," 367 U. S. at

84-85, and pointed out that the initial findings under the Act "must be made after full administrative hearing subject to judicial review * * *" *Id.* at 87.

If anything, the statutes now under attack are less like a bill of attainder than the act held constitutional in *Communist Party* v. *Subversive Activities Control Board,* since the New York statutes provide opportunity for hearing and judicial review not only for the organizations listed, but also for their members. In short, in terms of a recent analysis of the history and purpose of the bill of attainder clause, the New York legislature here laid down "rules of general applicability", leaving "the job of application to other tribunals." Comment, The Bounds of Legislative Specification: A Suggested Approach to the Bill of Attainder Clause, 72 Yale L. J. 330, 347, 350 (1962).

C. The Due Process Clause.

Plaintiffs' principal challenge to the New York statutes and procedures is based on the protection afforded to free speech by the First Amendment, applicable to the states under the Fourteenth Amendment. Plaintiffs maintain that the New York laws and procedures impinge upon the rights of freedom of speech, thought, and expression more than is necessary to protect the state from violent overthrow, both by being too broad and vague, and by imposing an unfair burden on those who may be adversely affected, requiring them to justify their conduct.

1. Procedural Due Process and Speiser v. *Randall.*

Plaintiffs' "burden of justification" argument rests in large part on *Speiser* v. *Randall,* 357 U. S. 513 (1958), in which the Court held to be against due process of California statute which required veterans to file oaths declaring that

they did not advocate the overthrow of government by force, violence, or other unlawful means, before they could receive a state tax exemption. The essence of the Court's opinion was that by putting the burden of taking the first step and of proving eligibility on the applicants, the statute made it more likely that the exemption would be denied in borderline cases, and therefore that "legitimate utterance will be penalized." 357 U. S. at 526. The Court distinguished the *Garner* and *Douds* cases, in which oaths were upheld as valid prerequisites to state employment and union office, by pointing out that those cases "concerned a limited class of persons in or aspiring to public positions by virtue of which they could, if evilly motivated, create serious danger to the public safety," *id.* at 527, and that in those cases persons by taking the oaths could retain their positions subject to further proceedings in which the government would have the burden of proof. The Court also distinguished the New York statutes upheld in *Adler*, on the grounds that under those statutes "public-school teachers could be dismissed on security grounds only after a hearing at which the official pressing the charges sustained his burden of proof by a fair preponderance of the evidence." 357 U. S. at 528 n.8.

Later decisions have made clear that *Speiser* does not create a rule of law that a potential suspect in an area concerning freedom of speech must never be called upon to justify his conduct. *E.g., Nelson* v. *County of Los Angeles*, 362 U. S. 1 (1960), upholding discharges of county employees based upon their refusal to answer questions concerning subversive activities put to them by a congressional subcommittee; *Konigsberg* v. *State Bar*, 366 U. S. 36 (1961) and *In re Anastaplo*, 366 U. S. 82 (1961), holding that admission to a state bar could be denied on the basis of an applicant's refusal to answer questions concerning Com-

munist activities. Instead, *Speiser* holds that in a case concerning First Amendment freedoms, the burden of proof must rest upon the attacker as much as possible, consonant with the protection of the legitimate interest asserted by the attacker.

In the present case, the university requirement that all teachers sign "Feinberg certificates" may have raised problems under *Speiser,* although apparently the teachers could retain their positions by signing the certificates, subject only to further proceedings in which the state would bear the burden of proof. But the university has discontinued its reliance on the certificate procedure, as of June 10, 1965. The state now investigates prospective appointees by asking the candidate and others questions concerning his compliance with the laws. The candidate is given a chance to explain his doubts, not provided under the certificate procedure. Absolute refusal to answer is made grounds for refusal to appoint; but this seems reasonable, in light of the opportunity to explain. Persons employed before June 10, 1965, shall not be deemed disqualified "solely by reason of" their failure to sign the Feinberg certificate. The State thus would have the burden of showing violations of the statutes, following the statutory procedures for dismissal as to teachers with tenure.

Plaintiffs maintain that teachers serving on contract and without tenure are denied procedural due process, since they are guaranteed by the Regents' regulations only "such hearings * * * as [the school authorities] deem the exigencies warrant * * *" In particular, plaintiffs point to the dismissal of Starbuck as evidence that the state will not give an adequate hearing to teachers without tenure.

It appears that after Starbuck failed to answer the question about subversive activities on his employment form,

he was told that he must answer it yes or no, and could explain if he answered yes. He did not answer, and was dismissed. We understand the law of New York to be in accordance with the advice given to Starbuck by the university officials. Although a teacher without tenure, Starbuck would have had an opportunity to explain and a right to a full hearing on whether or not he had violated the substantive provisions of the law, if he had answered the question yes. *Hughes* v. *Board of Higher Education,* 309 N. Y. 319, 130 N. E. 2d 638 (1955); *Lederman* v. *Board of Education,* 276 App. Div. 527, 96 N. Y. S. 2d 466 (2d Dep't 1950), *aff'd sub nom. Thompson* v. *Wallin,* 301 N. Y. 476, 95 N. E. 2d 806 (1950), *aff'd sub. nom. Adler* v. *Board of Education,* 342 U. S. 485 (1952). In light of this opportunity for explanation and a hearing, Starbuck cannot complain of lack of procedural due process. His dismissal was for insubordination in refusing to answer a relevant inquiry, and the Constitution does not require any hearing on one's reasons for refusal to cooperate with a relevant inquiry. See *Nelson* v. *County of Los Angeles,* 362 U. S. 1 (1960); *Konigsberg* v. *State Bar,* 366 U. S. 36 (1961); and *In re Anastaplo,* 366 U. S. 82 (1961). *Slochower* v. *Board of Education,* 350 U. S. 551 (1956) may be distinguished, since in that case the Court found no necessary connection between Slochower's refusal to answer questions concerning activities twelve years before, put to him not by a school board but by a congressional committee, and his unfitness for service in the New York schools. Here Starbuck refused to answer a question put to him by school authorities concerning whether or not he presently advocated the violent overthrow of government.

Plaintiffs also assert that the provisions of Section 3022 of the Education Law and Section 105(1) of the Civil Service Law which make membership in the Communist

Party *prima facie* evidence of disqualification for employment by the state are contrary to procedural due process. The same argument was before the Supreme Court in *Adler*, and the Court decisively rejected it:

> "Membership in a listed organization found to be within the statute and known by the member to be within the statute is a legislative finding that the member by his membership supports the thing the organization stands for, namely, the overthrow of government by unlawful means. We cannot say that such a finding is contrary to fact or that 'generality of experience' points to a different conclusion. Disqualification follows therefore as a reasonable presumption from such membership and support. Nor is there here a problem of procedural due process. The presumption is not conclusive but arises only in a hearing where the person against whom it may arise has a full opportunity to rebut it * * *. Where, as here, the relation between the fact found and the presumption is clear and direct and is not conclusive, the requirements of due process are satisfied."

342 U. S. 485, 494-96 (1952).

In support of its position, the Court looked to the interpretation of the statute by the New York courts below. *Lederman* v. *Board of Education*, 276 App. Div. 527, 530, 96 N. Y. S. 2d 466, 470 (2d Dept. 1950), *aff'd sub nom. Thompson* v. *Wallin, supra*, 806, 815 (1950). The Courts of New York not having changed their interpretation of the presumption contained in these statutes, see *Hughes* v. *Board of Higher Education*, 309 N. Y. 319, 130 N. Y. 2d 638 (1955), there is no reason to hold the presumption violative of due process today.

2. "Vagueness"

The plaintiffs maintain that breadth of language renders the statutes under attack unconstitutional, because it tends

to deter legitimate expression as well as expression which the State is justified in regulating. It is, of course, true that strict standards of draftsmanship are to be applied to a statute having a potentially inhibiting effect on speech; "a man may be the less required to act at his peril here, because the free dissemination of ideas may be the loser." *Smith* v. *California*, 361 U. S. 147, 151 (1959). However, we must examine the present statutory complex, as implemented by the Regents' regulations and as interpreted by the New York Courts, to see whether it has a tendency to deter legitimate discussion and activities as well as to carry out the permissible objective of preventnig the advocacy of violent overthrow of government.

Subsection 2 of Section 3022 of the Education Law provides that the Board of Regents shall list organizations found to advocate, advise, teach or embrace the doctrine that the government of the United States or of any state or political subdivision thereof shall be overthrown * * * by force" or found to "advocate, advise, teach, or embrace the duty, necessity, or propriety of adopting any such doctrine * * *." Section 105(1) of the Civil Service Law lists three causes for ineligibility for employment in the state civil service; wilfully advocating, advising, or teaching the doctrine of violent overthrow of government; publishing, editing, or selling any printed matter containing such a doctrine, while advocating the necessity or propriety of adopting the doctrine; and organizing or becoming a member of a group of persons advocating such a doctrine.

Legitimate activities are not deterred by these sections of the statutes. Not teaching Communist theory in a course in economic or political history; only teaching that government shall or should "be overthrown * * * by force" is a

basis for adverse consequences under these sections. Not innocent membership in the Communist Party, in contrast to what could have been deterred by the oath struck down in *Wieman* v. *Updegraff*, 344 U. S. 183 (1952); only knowing membership in an organization advocating the violent overthrow of government is grounds for ineligibility for state employment. *Lederman* v. *Board of Education*, 276 App. Div. 527, 530, 96 N. Y. S. 2d 466, 470 (2d Dept. 1950), *aff'd sub nom. Thompson* v. *Wallin*, 301 N. Y. 476, 95 N. E. 2d 806 (1950), *aff'd sub nom. Adler* v. *Board of Education*, 342 U. S. 485 (1952); see also *Adler* v. *Wilson*, 282 App. Div. 418, 123 N. Y. S. 2d 655 (3d Dept. 1953).

Nor do these sections deter all distribution of Communist propaganda, or the editing of Communist literature. Under Section 105(1)(b), a distributor or editor of subversive literature must also advocate or embrace the "duty, necessity, or propriety" of adopting the doctrine of violent overthrow, before he can be disqualified from state employment. Finally, the sections just described do not deter representing the Communist Party in a lawsuit, or defending the constitutional rights of the Communist Party in a newspaper article, or voting for a candidate also supported by the Communist Party—the legitimate activities which the Supreme Court feared might be deterred by the broad oaths struck down in *Cramp* v. *Board of Public Instruction*, 368 U. S. 278 (1961) (state employees had to swear that they had never lent their "aid, support, advice, counsel, or influence to the Communist Party") and in *Baggett* v. *Bullitt*, 377 U. S. 360 (1964) (state teachers had to swear, among other things, that they did not aid any person to aid in the commission of any act intended to alter the constitutional form of government by force or violence).

The Supreme Court in *Baggett* made clear that narrowly drawn statutes aimed wholly at the control of subversive

activities would be upheld as constitutional. The Court distinguished the broad oath before it in *Baggett* from the oath upheld in *Gerende* v. *Board of Supervisors*, 341 U. S. 56 (1951), on the grounds that the *Gerende* oath required a candidate for state office to swear only that he is not engaged "in one way or another in the attempt to overthrow the government by force or violence," and that he is not knowingly a member of an organization engaged in such an attempt. The sections of the New York statutes just analyzed proscribe no more than the oath upheld in *Gerende*, and seem less questionable even than *Gerende* since they place the burden of taking the first step and the burden of proof on the official challenging eligibility. The Supreme Court upheld these sections, 3022 of the Education Law and 105(1) and (2) of the Civil Service Law (the last two subsections then being known as 12(a) of the Civil Service Law), in *Adler* v. *Board of Education*, 342 U. S. 485 (1952), although the sections were attacked on grounds of vagueness at that time. We see no reason to change the result of that case.

The remaining sections of the statutes under attack seem at first glance more general. Section 3021 of the Education Law provides for the removal of school employees "for the utterance of any treasonable or seditious word or words or the doing of any treasonable or seditious act or acts" while employed in the school system. Section 105(3) of the Civil Service Law provides for the removal of civil servants from office for "treasonable or seditious" words or acts.

However, the 1958 amendments to section 105(3) greatly restricted the scope of that subsection. N. Y. Sess. Laws 1958, ch. 790, sec. 105. "Treasonable words or acts", for

the purpose of 105(3), now must come within the definition of "treason" in Section 2380 of the Penal Law:

> "1. Levying war against the people of the state within this state; or, 2. A combination of two or more persons by force to usurp the government of the state or to overturn the same, shown by a forcible attempt, made within the state, to accomplish that purpose; or, 3. Adhering to the enemies of the state, while separately engaged in war with a foreign enemy, in a case prescribed by the constitution of the United States, as giving to such enemies aid and comfort within the state or elsewhere."

We do not understand the plaintiffs to challenge this definition of treason on grounds of vagueness; it is as good as can be done, and resembles the definition used in Article III, section 3, of the Federal Constitution. Even the third clause of the New York definition is narrow, having been construed to apply only in wars against foreign enemies waged by the State of New York separately from the United States. *People* v. *Lynch*, 11 Johns, R. 549 (1814).

Similarly, "seditious acts and utterances", for the purpose of section 105(3), now must come within the definition of "criminal anarchy" in section 160 of the Penal Law:

> "the doctrine that organized government should be overthrown by force or violence or by assassination of the executive head or of any of the executive officials of government, or by any unlawful means."

This is a definition closely connected with the state's legitimate interest in self-preservation, and as such is within the realm of the constitutional under *Gerende, Cramp,* and *Baggett.* We note in passing that the 1958 amendment to section 105(3) refers to section 160 of the Penal Law, entitled "Criminal anarchy defined". The looser language of section 161 of the Penal Law, entitled "Advocacy of

criminal anarchy", is not now before us, although the plaintiffs seem to wish that it were.

The 1958 amendments of section 105(3) did not, by their terms, extend to the parallel language of section 3021. But the history of the two sections—born as successive sections of an act of 1917, N. Y. Sess. Laws 1917, ch. 416, secs. 2 and and 3—together with the identity of langauge in the two sections, indicates that the two must be construed *in pari materia*. The presumption that statutes "will be construed in such a way as to avoid the constitutional question presented". *Baggett* v. *Bullitt*, 377 U. S. 360, 375 (1964), reinforces us in the conclusion that the words "seditious or treasonable acts or words" in section 3021, like their identical twins in section 105(3), must be defined by reference to sections 2330 and 160 of the Penal Law. When this is done, sections 3021 and 105(3)—like the separable but related Section 3022 and 105(1) and (2)—become sharply defined, and can withstand any possible attack on grounds of vagueness.

III. Conclusion

We find constitutional section 105 of the Civil Service Law, Sections 3021 and 3022 of the Education Law, Section 244 of Article XVIII of the Rules of the Board of Regents, and the procedures under these statutes and rules now in effect at the State University of New York at Buffalo. We accordingly give judgment for the defendants, and deny the plaintiffs all the relief requested by them.

/s/ LEONARD P. MOORE
U. S. C. J.

/s/ HAROLD P. BURKE
U. S. J. U. S. D. C.

/s/ JOHN O. HENDERSON
U. S. D. J.

January 5th, 1966.

Appendix B

ADLER *v.* BOARD OF EDUCATION.

Syllabus.

ADLER ET AL. *v.* BOARD OF EDUCATION OF THE CITY OF NEW YORK.

APPEAL FROM THE COURT OF APPEALS OF NEW YORK.

No. 8. Argued January 3, 1952.—Decided March 3, 1952.

The Civil Service Law of New York, § 12-a, makes ineligible for employment in any public school any member of any organization advocating the overthrow of the Government by force, violence or any unlawful means. Section 3022 of the Education Law, added by the Feinberg Law, requires the Board of Regents (1) to adopt and enforce rules for the removal of any employee who violates, or is ineligible under, § 12-a, (2) to promulgate a list of organizations described in § 12-a, and (3) to provide in its rules that membership in any organization so listed is *prima facie* evidence of disqualification for employment in the public schools. No organization may be so listed, and no person severed from or denied employment, except after a hearing and subject to judicial review. *Held:* This Court finds no constitutional infirmity in § 12-a of the Civil Service Law of New York or in § 3022 of the Education Law. Pp. 486-496.

1. Section 3022 and the rules promulgated thereunder do not constitute an abridgment of the freedom of speech and assembly of persons employed or seeking employment in the public schools of New York. *Garner* v. *Los Angeles Board,* 341 U. S. 716. Pp. 491-493.

2. The provisions of § 3022 directing the Board of Regents to provide in rules thereunder that member-

ship in any organization so listed by the Board shall constitute *prima facie* evidence of disqualification for employment in the public schools does not deny members of such organizations due process of law. Pp. 494-496.

3. The use of the word "subversive" in § 1 of the Feinberg Law, which is a preamble and not a definitive part of the Act, does not render the statute void for vagueness under the Due Process Clause, in view of the fact that in subdivision 2 of § 3022 it is given a very definite meaning—*i.e.*, an organization that advocates the overthrow of government by force or violence. P. 496.

4. The constitutionality of § 3021 of the Education Law not having been questioned in the proceedings in the lower courts and being raised here for the first time, it will not be passed upon by this Court before the state courts have had an opportunity to pass upon it. P. 496.

301 N. Y. 476, 95 N. E. 2d 806, affirmed.

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OCTOBER TERM, 1951.

Opinion of the Court.

In a declaratory judgment action, the Supreme Court of New York, Kings County, held that subdivision (c) of § 12-a of the New York Civil Service Law, § 3022 of the New York Education Law, and the rules of the State Board of Regents promulgated thereunder violated the Due Process Clause of the Fourteenth Amendment, and enjoined action thereunder by the Board of Education of New York City. 196 Misc. 873, 95 N. Y. S. 2d 114. The Appellate Division reversed. 276 App. Div. 527, 96 N. Y. S. 2d 466. The Court of Appeals of New York affirmed the decision of the Appellate Division. 301 N. Y.

476, 95 N. E. 2d 806. On appeal to this Court, *affirmed*, p. 496.

Osmond K. Fraenkel argued the cause for appellants. With him on the brief was *Arthur Garfield Hays*.

Michael A. Castaldi argued the cause for appellee. With him on the brief were *Denis M. Hurley, Seymour B. Quel, Daniel T. Scannell* and *Bernard Friedlander*.

By special leave of Court, *Wendell P. Brown*, Solicitor General, argued the cause for the State of New York, as *amicus curiae*, urging affirmance. With him on the brief were *Nathaniel L. Goldstein*, Attorney General, and *Ruth Kessler Toch*, Assistant Attorney General.

Dorothy Kenyon, Raymond L. Wise and *Herbert Monte Levy* filed a brief for the American Civil Liberties Union, as *amicus curiae*, supporting appellants.

Mr. Justice Minton delivered the opinion of the Court.

Appellants brought a declaratory judgment action in the Supreme Court of New York, Kings County, praying that § 12-a of the Civil Service Law,[1] as implemented by the so-called Feinberg Law,[2] be declared unconstitutional, and that action by the Board of Education of the City of New York thereunder be enjoined. On motion for judgment on the pleadings, the Court held that subdivision (c) of § 12-a, the Feinberg Law, and the Rules of the State Board of Regents promulgated thereunder violated the Due Process Clause of the Fourteenth Amendment, and issued an injunction. 196 Misc. 873, 85 N. Y. S. 2d 114. The Appellate Division of the Supreme Court reversed, 276 App. Div. 527, 96 N. Y. S. 2d 466, and the Court of Appeals affirmed the judgment of the Appellate Division,

[1] N. Y. Laws 1939, c. 547, as amended N. Y. Laws 1940, c. 564.

[2] N. Y. Laws 1949, c. 360.

301 N. Y. 476, 95 N. E. 2d 806. The appellants come here by appeal under 28 U. S. C. § 1257.

Section 12-a of the Civil Service Law, hereafter referred to as § 12-a, is set forth in the margin.[3] To implement this law, the Feinberg Law was passed, adding a new

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[3] "§ 12-a. *Ineligibility*

"No person shall be appointed to any office or position in the service of the state or of any civil division or city thereof, nor shall any person presently employed in any such office or position be continued in such employment, nor shall any person be employed in the public service as superintendents, principals or teachers in a public school or academy or in a state normal school or college, or any other state educational institution who: (a) By word of mouth or writing wilfully and deliberately advocates, advises or teaches the doctrine that the government of the United States or of any state or of any political subdivision thereof should be overthrown or overturned by force, violence or any unlawful means; or

"(b) Prints, publishes, edits, issues or sells, any book, paper, document or written or printed matter in any form containing or advocating, advising or teaching the doctrine that the government of the United States or of any state or of any political subdivision thereof should be overthrown by force, violence or any unlawful means, and who advocates, advises, teaches, or embraces the duty, necessity or propriety of adopting the doctrine contained therein;

"(c) Organizes or helps to organize or becomes a member of any society or group of persons which teaches or advocates that the government of the United States or of any state or of any political subdivision thereof shall be overthrown by force or violence, or by any unlawful means;

"(d) A person dismissed or declared ineligible may within four months of such dismissal or declaration of ineligibility be entitled to petition for an order to show cause signed by a justice of the supreme court, why a hearing on such charges should not be had. Until the final judgment on said hearing is entered, the order to show cause shall stay the effect of any order of dismissal or ineligibility based on the provisions of this section. The hearing shall consist of the taking of testimony in open court with opportunity for cross-examination. The burden of sustaining the validity of the order of dismissal or ineligibility by a fair preponderance of the credible evidence shall be upon the person making such dismissal or order of ineligibility."

section, § 3022, to the Educational Law of the State of New York, which section so far as here pertinent is set forth in the margin.[4] The Feinberg Law was also to implement § 3021 of the Educational Law of New York.[5] The consti-

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[4] "§ 3022. *Elimination of subversive persons from the public school system*

"1. The board of regents shall adopt, promulgate, and enforce rules and regulations for the disqualification or removal of superintendents of schools, teachers or employees in the public schools in any city or school district of the state who violate the provisions of section three thousand twenty-one of this article or who are ineligible for appointment to or retention in any office or position in such public schools on any of the grounds set forth in section twelve-a of the civil service law and shall provide therein appropriate methods and procedure for the enforcement of such sections of this article and the civil service law.

"2. The board of regents shall, after inquiry, and after such notice and hearing as may be appropriate, make a listing of organizations which it finds to be subversive in that they advocate, advise, teach or embrace the doctrine that the government of the United States or of any state or of any political subdivision thereof shall be overthrown or overturned by force, violence or any unlawful means, or that they advocate, advise, teach or embrace the duty, necessity or propriety of adopting any such doctrine, as set forth in section twelve-a of the civil service law. Such listings may be amended and revised from time to time. The board, in making such inquiry, may utilize any similar listings or designations promulgated by any federal agency or authority authorized by federal law, regulation or executive order, and for the purposes of such inquiry, the board may request and receive from such federal agencies or authorities any supporting material or evidence that may be made available to it. The board of regents shall provide in the rules and regulations required by subdivision one hereof that membership in any such organization included in such listing made by it shall constitute *prima facie* evidence of disqualification for appointments to or retention in any office or position in the public schools of the state."

[5] "§ 3021. *Removal of superintendents, teachers and employees for treasonable or seditious acts or utterances*

"A person employed as superintendent of schools, teacher or employee in the public schools, in any city or school district of the state, shall be removed from such position for the utterance of any treasonable or seditious word or words or the doing of any treasonable or seditious act or acts while holding such position."

tutionality of this section was not attacked in the proceedings below.

The preamble of the Feinberg Law, §1, makes elaborate findings that members of subversive groups, particularly of the Communist Party and its affiliated organizations, have been infiltrating into public employment in the public schools of the State; that this has occurred and continues notwithstanding the existence of protective statutes designed to prevent the appointment to or retention in employment in public office, and particularly in the public schools, of members of any organizations which teach or advocate that the government of the United States or of any state or political subdivision thereof shall be overthrown by force or violence or by any other unlawful means. As a result, propaganda can be disseminated among the children by those who teach them and to whom they look for guidance, authority, and leadership. The Legislature further found that the members of such groups use their positions to advocate and teach their doctrines, and are frequently bound by oath, agreement, pledge, or understanding to follow, advocate and teach a prescribed party line or group dogma or doctrine without regard to truth or free inquiry. This propaganda, the Legislature declared, is sufficiently subtle to escape detection in the classroom; thus, the menace of such infiltration into the classroom is difficult to measure. Finally, to protect the children from such influence, it was thought essential that the laws prohibiting members of such groups, such as the Communist Party or its affiliated organizations, from obtaining or retaining employment in the public schools be rigorously enforced. It is the purpose of the Feinberg Law to provide for the disqualification and removal of superintendents of schools, teachers, and employees in the public schools in any city or school district of the State who advocate the

overthrow of the Government by unlawful means or who are members of organizations which have a like purpose.

Section 3022 of the Education Law, added by the Feinberg Law, provides that the Board of Regents, which has charge of the public school system in the State of New York, shall, after full notice and hearing, make a listing of organizations which it finds advocate, advise, teach, or embrace the doctrine that the government should be overthrown by force or violence or any other unlawful means, and that such listing may be amended and revised from time to time.

It will be observed that the listings are made only after full notice and hearing. In addition, the Court of Appeals construed the statute in conjunction with Article 78 of the New York Civil Practice Act, Gilbert-Bliss' N. Y. Civ. Prac., Vol. 6B, so as to provide listed organizations a right of review.

The Board of Regents is further authorized to provide in rules and regulations, and has so provided, that membership in any listed organization, after notice and hearing, "shall constitute *prima facie* evidence for disqualification for appointment to or retention in any office or position in the school system";[6] but before one who is an employee

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[6] "§ 254. *Disqualification or removal of superintendents, teachers and other employes.*

* * *

"2. *List of subversive organizations to be issued.* Pursuant to chapter 360 of the Laws of 1949, the Board of Regents will issue a list, which may be amended and revised from time to time, of organizations which the Board finds to be subversive in that they advocate, advise, teach or embrace the doctrine that the Government of the United States, or of any state or of any political subdivision thereof, shall be overthrown or overturned by force, violence or any unlawful means, or that they advocate, advise, teach or em-

(Footnote continued on following page)

or seeks employment is severed from or denied employment, he likewise must be given a full hearing with the privilege of being represented by counsel and the right to judicial review.[7] It is § 12-a of the Civil Service Law, as implemented by the Feinberg Law as above indicated, that is under attack here.

It is first argued that the Feinberg Law and the rules promulgated thereunder constitute an abridgment of the freedom of speech and assembly of persons employed or seeking employment in the public schools of the State of New York.

It is clear that such persons have the right under our law to assemble, speak, think and believe as they will. *Communications Assn.* v. *Douds,* 339 U. S. 382. It is equally clear that they have no right to work for the State in the school system on their own terms. *United Public Workers* v. *Mitchell,* 330 U. S. 75. They may work for the school system upon the reasonable terms laid down by the proper authorities of New York. If they do not choose

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(Footnote continued from preceding page)

brace the duty, necessity or propriety of adopting any such doctrine, as set forth in section 12-a of the Civil Service Law. Evidence of membership in any organization so listed on or after the tenth day subsequent to the date of official promulgation of such list shall constitute *prima facie* evidence of disqualification for appointment to or retention of any office or position in the school system. Evidence of membership in such an organization prior to said day shall be presumptive evidence that membership has continued, in the absence of a showing that such membership has been terminated in good faith." Official Compilation of Codes, Rules and Regulations of the State of New York (Fifth Supp.), Vol. 1, pp. 205-206.

[7] The Court of Appeals construed the statute in conjunction with § 12-a subd. [d], *supra,* n. 3. The Rules of the Board of Regents provided: "In all cases all rights to a fair trial, representation by counsel and appeal or court review as provided by statute or the Constitution shall be scrupulously observed." Section 254, 1 (e), Official Compilation of Codes, Rules and Regulations of the State of New York (Fifth Supp.), Vol. 1, p. 206.

to work on such terms, they are at liberty to retain their beliefs and associations and go elsewhere. Has the State thus deprived them of any right to free speech or assembly? We think not. Such persons are or may be denied, under the statutes in question, the privilege of working for the school system of the State of New York because, first, of their advocacy of the overthrow of the government by force or violence, or, secondly, by unexplained membership in an organization found by the school authorities, after notice and hearing, to teach and advocate the overthrow of the government by force or violence, and known by such persons to have such purpose.

The constitutionality of the first proposition is not questioned here. *Gitlow* v. *New York,* 268 U. S. 652, 667-672, construing § 161 of the New York Penal Law.

As to the second, it is rather subtly suggested that we should not follow our recent decision in *Garner* v. *Los Angeles Board,* 341 U. S. 716. We there said:

> "We think that a municipal employer is not disabled because it is an agency of the State from inquiring of its employees as to matters that may prove relevant to their fitness and suitability for the public service. Past conduct may well relate to present fitness; past loyalty may have a reasonable relationship to present and future trust. Both are commonly inquired into in determining fitness for both high and low positions in private industry and are not less relevant in public employment." 341 U. S., at p. 720.

We adhere to that case. A teacher works in a sensitive area in a schoolroom. There he shapes the attitude of young minds towards the society in which they live. In this, the state has a vital concern. It must preserve the integrity of the schools. That the school authorities have the right and the duty to screen the officials, teachers, and

employees as to their fitness to maintain the integrity of the schools as a part of ordered society, cannot be doubted. One's associates, past and present, as well as one's conduct, may properly be considered in determining fitness and loyalty. From time immemorial, one's reputation has been determined in part by the company he keeps. In the employment of officials and teachers of the school system, the state may very properly inquire into the company they keep, and we know of no rule, constitutional or otherwise, that prevents the state, when determining the fitness and loyalty of such persons, from considering the organizations and persons with whom they associate.

If, under the procedure set up in the New York law, a person is found to be unfit and is disqualified from employment in the public school system because of membership in a listed organization, he is not thereby denied the right of free speech and assembly. His freedom of choice between membership in the organization and employment in the school system might be limited, but not his freedom of speech or assembly, except in the remote sense that limitation is inherent in every choice. Certainly such limitation is not one the state may not make in the exercise of its police power to protect the schools from pollution and thereby to defend its own existence.

It is next argued by appellants that the provision in § 3022 directing the Board of Regents to provide in rules and regulations that membership in any organization listed by the Board after notice and hearing, with provision for review in accordance with the statute, shall constitute *prima facie* evidence of disqualification, denies due process, because the fact found bears no relation to the fact presumed. In other words, from the fact found that the organization was one that advocated the overthrow of govern-

ment by unlawful means and that the person employed or to be employed was a member of the organization and knew of its purpose,[8] to presume that such member is disqualified for employment is so unreasonable as to be a denial of due process of law. We do not agree.

> "The law of evidence is full of presumptions either of fact or law. The former are, of course, disputable, and the strength of any inference of one fact from proof of another depends upon the generality of the experience upon which it is founded. * * *
>
> "Legislation providing that proof of one fact shall constitute *prima facie* evidence of the main fact in issue is but to enact a rule of evidence, and quite within the general power of government. Statutes, National and state, dealing with such methods of proof in both civil and criminal cases abound, and the decisions upholding them are numerous." *Mobile, J. & K. C. R. Co.* v. *Turnipseed*, 219 U. S. 35, at p. 42.

Membership in a listed organization found to be within the statute and known by the member to be within the statute is a legislative finding that the member by his membership supports the thing the organization stands for, namely, the overthrow of government by unlawful means. We cannot say that such a finding is contrary to fact or that "generality of experience" points to a different conclusion. Disqualification follows therefore as a reasonable presumption from such membership and support. Nor is there here a problem of procedural due process. The presumption is not conclusive but arises only in a hearing where the person against whom it may arise has full opportunity to rebut it. The holding of the Court of Appeals below is significant in this regard:

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[8] In the proceedings below, both the Appellate Division of the Supreme Court and the Court of Appeals construed the statute to require such knowledge. 276 App. Div. 527, 530, 96 N. Y. S. 2d 466,

"The statute also makes it clear that * * * proof of such membership 'shall constitute *prima facie* evidence of disqualification' for such employment. But, as was said in *Potts* v. *Pardee* (220 N. Y. 431, 433): 'The presumption growing out of a *prima facie* case * * * remains only so long as there is no substantial evidence to the contrary. When that is offered the presumption disappears, and unless met by further proof there is nothing to justify a finding based solely upon it.' Thus, the phrase '*prima facie* evidence of disqualification,' as used in the statute, imports a hearing at which one who seeks appointment to or retention in a public school position shall be afforded an opportunity to present substantial evidence contrary to the presumption sanctioned by the *prima facie* evidence for which subdivision 2 of section 3022 makes provision. Once such contrary evidence has been received, however, the official who made the order of ineligibility has thereafter the burden of sustaining the validity of that order by a fair preponderance of the evidence. (Civil Service Law, § 12-a, subd. [d].) Should an order of ineligibility then issue, the party aggrieved thereby may avail himself of the provisions for review prescribed by the section of the statute last cited above. In that view there here arises no question of procedural due process." 301 N. Y. 476, at p. 494, 95 N. E. 2d 806, at 814-815.

Where, as here, the relation between the fact found and the presumption is clear and direct and is not conclusive, the requirements of due process are satisfied.

Without raising in the complaint or in the proceedings in the lower courts the question of the constitutionality of § 3021 of the Education Law of New York, appellants urge here for the first time that this section is unconstitutionally vague. The question is not before us. We will not pass upon the constitutionality of a state statute before the state courts have had an opportunity to do so. *Asbury Hospital* v. *Cass County,* 326 U. S. 207, 213-216; *Alabama*

State Federation of Labor v. *McAdory,* 325 U. S. 450, 460-462; *Plymouth Coal Co.* v. *Pennsylvania,* 232 U. S. 531, 546.

It is also suggested that the use of the word "subversive" is vague and indefinite. But the word is first used in § 1 of the Feinberg Law, which is the preamble to the Act, and not in a definitive part thereof. When used in subdivision 2 of § 3022, the word has a very definite meaning, namely, an organization that teaches and advocates the overthrow of government by force or violence.

We find no constitutional infirmity in § 12-a of the Civil Service Law of New York or in the Feinberg Law which implemented it, and the judgment is

Affirmed.

MR. JUSTICE BLACK, dissenting.

While I fully agree with the dissent of MR. JUSTICE DOUGLAS, the importance of this holding prompts me to add these thoughts.

This is another of those rapidly multiplying legislative enactments which make it dangerous—this time for school teachers—to think or say anything except what a transient majority happen to approve at the moment. Basically these laws rest on the belief that government should supervise and limit the flow of ideas into the minds of men. The tendency of such governmental policy is to mould people into a common intellectual pattern. Quite a different governmental policy rests on the belief that government should leave the mind and spirit of man absolutely free. Such a governmental policy encourages varied intellectual outlooks in the belief that the best views will prevail. This policy of freedom is in my judgment embodied in the First Amendment and made applicable to the states by the Fourteenth. Because of this policy public officials

cannot be constitutionally vested with powers to select the ideas people can think about, censor the public views they can express, or choose the persons or groups people can associate with. Public officials with such powers are not public servants; they are public masters.

I dissent from the Court's judgment sustaining this law which effectively penalizes school teachers for their thoughts and their associates.

MR. JUSTICE FRANKFURTER, dissenting.

We are asked to pass on a scheme to counteract what are currently called "subversive" influences in the public school system of New York. The scheme is formulated partly in statutes and partly in administrative regulations, but all of it is still an unfinished blueprint. We are asked to adjudicate claims against its constitutionality before the scheme has been put into operation, before the limits that it imposes upon free inquiry and association, the scope of scrutiny that it sanctions, and the procedural safeguards that will be found to be implied for its enforcement have been authoritatively defined. I think we should adhere to the teaching of this Court's history to avoid constitutional adjudications on merely abstract or speculative issues and to base them on the concreteness afforded by an actual, present, defined controversy, appropriate for judicial judgment, between adversaries immediately affected by it. In accordance with the settled limits upon our jurisdiction I would dismiss this appeal.

An understanding of the statutory scheme and the action thus far taken under it is necessary to a proper consideration of the issues which for me control disposition of the case, namely, standing of the parties and ripeness of the constitutional question.

A New York enactment of 1949 precipitated this litigation. But that legislation is tied to prior statutes. By a law of 1917 "treasonable or seditious" utterances or acts barred employment in the public schools. New York Education Law, § 3021. In 1939 a further enactment disqualified from the civil service and the educational system anyone who advocates the overthrow of government by force, violence or any unlawful means, or publishes material advocating such overthrow or organizes or joins any society advocating such doctrine. New York Civil Service Law, § 12-a. This states with sufficient accuracy the provisions of this Law, which also included detailed provisions for the hearing and review of charges.

During the thirty-two years and ten years, respectively, that these laws have stood on the books, no proceedings, so far as appears, have been taken under them. In 1949 the Legislature passed a new act, familarly known as the Feinberg Law, designed to reinforce the prior legislation. The Law begins with a legislative finding, based on "common report" of widespread infiltration by "members of subversive groups, and particularly of the communist party and certain of its affiliated organizations," into the educational system of the State and the evils attendant upon that infiltration. It takes note of existing laws and exhorts the authorities to greater endeavor of enforcement. The State Board of Regents, in which are lodged extensive powers over New York educational system, was charged by the Feinberg Law with these duties:

(1) to promulgate rules and regulations for the more stringent enforcement of existing law;

(2) to list "after inquiry, and after such notice and hearing as may be appropriate" those organizations membership in which is proscribed by subsection (c) of § 12-a of the Civil Service law;

(3) to provide in its rules and regulations that membership in a listed organization shall be *prima facie* evidence of disqualification under § 12-a;

(4) to report specially and in detail to the legislature each year on measures taken for the enforcement of these laws.

Accordingly, the Board of Regents adopted Rules for ferreting out violations of § 3021 or § 12-a. An elaborate machinery was designed for annual reports on each employee with a view to discovering evidence of violations of these sections and to assuring appropriate action on such discovery. The Board also announced its intention to publish the required list of proscribed organizations and defined the significance of an employee's membership therein in proceedings for his dismissal. These Rules by the Board of Regents were published with an accompanying Memorandum by the Commissioner of Education. He is the administrative head of New York's school system and his Memorandum was for the guidance of school officials throughout the State. It warned of the danger of indiscriminate or careless action under the Feinberg Law and the Regents' Rules, and laid down this duty:

> "The statutes and the Regents' Rules make it clear that it is a primary duty of the school authorities in each school district to take positive action to eliminate from the school system any teacher in whose case there is evidence that he is guilty of subversive activity. School authorities are under obligation to proceed immediately and conclusively in every such case."

The Rules and Memorandum appear in the record; we shall have occasion to refer later to their relevance to what was decided below. Our attention has also been called to an order of the Board of Education of the City of New York, the present appellee. This order further elaborates

the part of the Regents' Rules dealing with reports on teachers. It is not clear whether this order has gone into effect. In any event it was not before the lower courts and is not in the record here.

It thus appears that we are asked to review a complicated statutory scheme prohibiting those who engage in the kind of speech or conduct that is proscribed from holding positions in the public school system. The scheme is aligned with a complex system of enforcement by administrative investigation, reporting and listing of proscribed organizations. All this must further be related to the general procedures under the New York law for hearing and reviewing charges of misconduct against educational employees, modified as those procedures may be by the Feinberg Law and the Regents' Rules.

This intricate machinery has not yet been set in motion. Enforcement has been in abeyance since the present suit, among others, was brought to enjoin the Board of Education from taking steps or spending funds under the statutes and Rules on the theory that these transgressed various limitations which the United States Constitution places on the power of the States. The case comes here on the bare bones of the Feinberg Law only partly given flesh by the Regents' Rules. It was decided wholly on pleadings: a complaint, identifying the plaintiffs and their interests, setting out the offending statutes and Rules, and concluding in a more or less argumentative fashion that these provisions violate numerous constitutional rights of the various plaintiffs; an answer, denying that the impact of the statute is unconstitutional and that the plaintiffs have any interest to support the suit. On these pleadings summary judgment in favor of some of the plaintiffs was granted by the Supreme Court in Kings County, 196 Misc.

873, 95 N. Y. S. 2d 114; this was reversed by the Appellate Division for the Second Department with direction that the complaint be dismissed, 276 App. Div. 527, 96 N. Y. S. 2d 466, and the Court of Appeals affirmed the Appellate Division. 301 N. Y. 476, 95 N. E. 2d 806. These pleadings and the opinions below are the basis on which we are asked to decide this case.

About forty plaintiffs brought the action initially; the trial court dismissed as to all but eight. 196 Misc., at 877, 95 N. Y. S. 2d, at 117-118. The others were found without standing to sue under New York law. The eight who are here as appellants alleged that they were municipal taxpayers and were empowered, by virtue of N. Y. Gen. Municipal Law § 51, to bring suit against municipal agencies to enjoin waste of funds. New York is free to determine how the views of its courts on matters of constitutionality are to be invoked. But its action cannot of course confer jurisdiction on this Court, limited as that is by the settled construction of Article III of the Constitution. We cannot entertain, as we again recognize this very day, a constitutional claim at the instance of one whose interest has no material significance and is undifferentiated from the mass of his fellow citizens. *Doremus* v. *Board of Education*, 342 U. S. 429. This is not a "pocketbook action." As taxpayers these plaintiffs cannot possibly be affected one way or the other by any disposition of this case, and they make no such claim. It may well be that the authorities will, if left free, divert funds and effort from other purposes for the enforcement of the provisions under review, though how much leads to the merest conjecture. But the total expenditure, certainly the new expenditure, necessary to implement the Act and Rules may well be *de minimis*. The plaintiffs at any rate have not attempted to show that any such expenditure would come from funds

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to which their taxes contribute. In short, they have neither alleged nor shown that our decision on the issues they tender would have the slightest effect on their tax bills or even on the aggregate bill of all the City's taxpayers whom they claim to represent. The high improbability of being able to make such a demonstration, in the circumstances of this case, does not dispense with the requirements for our jurisdiction. If the incidence of taxation in a city like New York bears no relation to the factors here under consideration, that is precisely why these taxpayers have no claim on our jurisdiction.

This ends the matter for plaintiffs Krieger and Newman. But six of the plaintiffs advanced grounds other than that of being taxpayers in bringing this action. Two are parents of children in New York City schools. Four are teachers in these schools. On the basis of the record before us these claims, too, are insufficient, in view of our controlling adjudications, to support the jurisdiction of this Court.

The trial court found the interests of the plaintiffs as parents inconsequential. 196 Misc., at 875, 95 N. Y. S. 2d, at 816. I agree. Parents may dislike to have children educated in a school system where teachers feel restrained by unconstitutional limitations on their freedom. But it is like catching butterflies without a net to try to find a legal interest, indispensable for our jurisdiction, in a parent's desire to have his child educated in schools free from such restrictions. The hurt to parents' sensibilities is too tenuous or the inroad upon rightful claims to public education too argumentative to serve as the earthy stuff required for a legal right judicially enforceable. The claim does not approach an immediacy or directness or solidity that which our whole process of constitutional adjudication has deemed a necessary condition to the Court's settlement of constitutional issues.

An apt contrast is provided by *McCollum* v. *Board of Education*, 333 U. S. 203, where a parent did present an individualized claim of his own that was direct and palpable. There the parent alleged that Illinois imposed restrictions on the child's free exercise of faith and thereby on the parent's. The basis of jurisdiction in the *McCollum* case was not at all a parental right to challenge in the courts—or at least in this Court—educational provisions in general. The closely defined encroachment of the particular arrangement on a constitutionally protected right of the child, and of the parent's right in the child, furnished the basis for our review. The Feinberg Law puts no limits on any definable legal interest of the child or of its parents.

This leaves only the teachers, Adler, Spencer, and George and Mark Friedlander. The question whether their interest as teachers was sufficient to give them standing to sue was thought by the trial court to be conclusively settled by our decision in *United Public Workers* v. *Mitchell*, 330 U. S. 75. I see no escape from the controlling relevance of the *Mitchell* case. There individual government employees sought to enjoin enforcement of the provisions of the Hatch Act forbidding government employees to take active part in politics. The complaint contained detailed recitals of the desire, intent and specific steps short of violation on the part of plaintiffs to engage in the prohibited activities. See *id.*, at 87-88, n. 18. There as here the law was attacked as violating constitutional guaranties of freedom of speech. We found jurisdiction wanting to decide the issue except as to one plaintiff whose conduct had already violated the applicable standards.

The allegations in the present action fall short of those found insufficient in the *Mitchell* case. These teachers do not allege that they have engaged in proscribed conduct

or that they have any intention to do so. They do not suggest that they have been, or are, deterred from supporting causes or from joining organizations for fear of the Feinberg Law's interdict, except to say generally that the system complained of will have this effect on teachers as a group. They do not assert that they are threatened with action under the law, or that steps are imminent whereby they would incur the hazard of punishment for conduct innocent at the time, or under standards too vague to satisfy due process of law. They merely allege that the statutes and Rules permit such action against some teachers. Since we rightly refused in the *Mitchell* case to hear government employees whose conduct was much more intimately affected by the law there attacked than are the claims of plaintiffs here, this suit is wanting in the necessary basis for our review.

This case proves anew the wisdom of rigorous adherence to the prerequisites for pronouncement by this Court on matters of constitutional law. The absence in these plaintiffs of the immediacy and solidity of interest necessary to support jurisdiction is reflected in the atmosphere of abstraction and ambiguity in which the constitutional issues are presented. The broad, generalized claims urged at the bar touch the deepest interests of a democratic society: its right to self-preservation and ample scope for the individual's freedom, especially the teacher's freedom of thought, inquiry and expression. No problem of a free society is probably more difficult than the reconciliation or accommodation of these too often conflicting interests. The judicial role in this process of accommodation is necessarily very limited and must be carefully circumscribed. To that end the Court, in its long history, has developed "a series of rules" carefully formulated by Mr. Justice Brandeis, "under which it has avoided passing upon a large

part of all the constitutional questions pressed upon it for decision." *Ashwander* v. *Tennessee Valley Authority*, 297 U. S. 288, 346.

We have emphasized that, as to the kind of constitutional questions raised by the Feinberg Law, "the distinction is one of degree, and it is for this reason that the effect of the statute in proscribing beliefs—like its effect in restraining speech or freedom of association—must be carefully weighed by the courts in determining whether the balance struck by [the State] comports with the dictates of the Constitution." *American Communications Assn.* v. *Douds*, 339 U. S. 382, 409. But as the case comes to us we can have no guide other than our own notions—however uncritically extra-judicial—of the real bearing of the New York arrangement on the freedom of thought and activity, and especially on the feeling of such freedom, which are, as I suppose no one would deny, part of the necessary professional equipment of teachers in a free society. The scheme for protecting the school system from being made the instrument of purposes other than a school system should serve in a free society—certainly a concern within the constitutional powers of a State—bristles with ambiguities which must enter into any constitutional decision we may make. Of these only a few have been considered by the courts below. We are told that an organization cannot be listed by the Regents except after hearing. 301 N. Y., at 488, 493, 494, 95 N. E. 2d, at 810-811, 814-815. From this it may be assumed that the hearing contemplated is that found wanting by some members of this Court in *Joint Anti-Fascist Refugee Committee* v. *McGrath*, 341 U. S. 123. The effect of the requirement that membership in a listed organization be *prima facie* evidence of disqualification in a dismissal proceeding is enlarged upon. 301 N. Y., at 494, 95 N. E. 2d, at 814-8-5. And the Court

of Appeals indicates that only one who "knowingly holds membership in an organization named upon any listing" is subjected to the operation of that rebuttable presumption. *Id.*, at 494, 95 N. E. 2d, at 814.

These are the only islands of clarity. Otherwise we are at sea. We are not told the meaning to be attributed to the words "treasonable or seditious" in § 3021 of the Education Law, though that is one of the two sections of preexisting law which the elaborate apparatus of the Feinberg Law is designed to enforce. In light of the experience under the Sedition Act of 1798, 1 Stat. 596, "seditious" can hardly be deemed a self-defining term or a word of art. See Miller, Crisis in Freedom, 136-137. Nor can we turn to practical application or judicial construction for sufficient particularity of the meaning to be attributed to the range of activity proscribed by § 12-a. Concern over the latitude afforded by such phrases as "the overthrow of government by * * * any unlawful means" when positions of trust or public employment are conditioned upon disbelief in such an objective cannot be deemed without warrant. See *American Communications Assn.* v. *Douds*, 339 U. S. 382, 415, 435; *Garner* v. *Board of Public Works of Los Angeles*, 341 U. S. 716, 724. In those cases the Court had ground for limiting the reach of a dubious formula. No such alternative is available here.

These gaps in our understanding of the precise scope of the statutory provisions are deepened by equal uncertainties in the implementing Rules. Indeed, according to the Appellate Division these Rules are not in the case. 276 App. Div., at 531, 96 N. Y. S. 2d, at 471. And the Court of Appeals was silent on the point. Therefore we are without enlightenment, for example, on the nature of the reporting system described by the Rules. This may be a vital

matter, affecting not the special circumstances of a particular case but coloring the whole scheme. For it may well be of constitutional significance whether the reporting system contemplates merely the notation as to each teacher that no evidence of disqualification has turned up, if such be the case, or whether it demands systematic and continuous surveillance and investigation of evidence. The difference cannot be meaningless, it may even be decisive, if our function is to balance the restrictions on freedom of utterance and of association against the evil to be suppressed. Again, the Rules seem to indicate that past activities of the proscribed organizations or past membership in listed organizations may be enough to bar new applicants for employment. But we do not know, nor can we determine it. This, too, may make a difference. See *Garner* v. *Board of Public Works of Los Angeles, supra,* at 729 (MR. JUSTICE BURTON dissenting in part). We do not know, nor can we ascertain, the effect of the presumption of continuing membership in proscribed organizations that is drawn from evidence of past membership "in the absence of a showing that such membership has been terminated in good faith." We are uninformed of the effect in law of the Commissioner's memorandum, and there is no basis on which to appraise its effect in practice. As for the order of the Board of Education of the City of New York, it is not even formally in the case. In the face of such uncertainties this Court has in the past found jurisdiction wanting, howsoever much the litigants were eager for constitutional pronouncements. *Alabama State Federation of Labor* v. *McAdory,* 325 U. S. 450; *Congress of Industrial Organizations* v. *McAdory,* 325 U. S. 472; *Rescue Army* v. *Municipal Court,* 331 U. S. 549; *Parker* v. *County of Los Angeles,* 338 U. S. 327.

This statement of reasons for declining jurisdiction sounds technical, perhaps, but the principles concerned are not so. Rare departures from them are regrettable chapters in the Court's history, and in well-known instances they caused great public misfortune.

MR. JUSTICE DOUGLAS, with whom MR. JUSTICE BLACK concurs, dissenting.

I have not been able to accept the recent doctrine that a citizen who enters the public service can be forced to sacrifice his civil rights.[9] I cannot for example find in our constitutional scheme the power of a state to place its employees in the category of second-class citizens by denying them freedom of thought and expression. The Constitution guarantees freedom of thought and expression to everyone in our society. All are entitled to it; and none needs it more than the teacher.

The public school is in most respects the cradle of our democracy. The increasing role of the public school is seized upon by proponents of the type of legislation represented by New York's Feinberg law as proof of the importance and need for keeping the school free of "subversive influences." But that is to misconceive the effect of this type of legislation. Indeed the impact of this kind of censorship on the public school system illustrates the high purpose of the First Amendment in freeing speech and thought from censorship.

The present law proceeds on a principle repugnant to our society—guilt by association. A teacher is disqualified because of her membership in an organization found to be

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[9] *United Public Workers* v. *Mitchell*, 330 U. S. 75; *Garner* v. *Board of Public Works of Los Angeles*, 341 U. S. 716.

"subversive." The finding as to the "subversive" character of the organization is made in a proceeding to which the teacher is not a party and in which it is not clear that she may even be heard. To be sure, she may have a hearing when charges of disloyalty are leveled against her. But in that hearing the finding as to the "subversive" character of the organization apparently may not be reopened in order to allow her to show the truth of the matter. The irrebuttable charge that the organization is "subversive" therefore hangs as an ominous cloud over her own hearing. The mere fact of membership in the organization raises a *prima facie* case of her own guilt. She may, it is said, show her innocence. But innocence in this case turns on knowledge; and when the witch hunt is on, one who must rely on ignorance leans on a feeble reed.

The very threat of such a procedure is certain to raise havoc with academic freedom. Youthful indiscretions mistaken causes, misguided enthusiasms—all long forgotten—become the ghosts of a harrowing present. Any organization committed to a liberal cause, any group organized to revolt against an hysterical trend, any committee launched to sponsor an unpopular program becomes suspect. These are the organizations into which Communists often infiltrate. Their presence infects the whole, even though the project was not conceived in sin. A teacher caught in that mesh is almost certain to stand condemned. Fearing condemnation, she will tend to shrink from any association that stirs controversy. In that manner freedom of expression will be stifled.

But that is only part of it. Once a teacher's connection with a listed organization is shown, her views become subject to scrutiny to determine whether her membership in the organization is innocent or, if she was formerly a

member, whether she has *bona fide* abandoned her membership.

The law inevitably turns the school system into a spying project. Regular loyalty reports on the teachers must be made out. The principals become detectives; the students, the parents, the community become informers. Ears are cocked for tell-tale signs of disloyalty. The prejudices of the community come into play in searching out the disloyal. This is not the usual type of supervision which checks a teacher's competency; it is a system which searches for hidden meanings in a teacher's utterances.

What was the significance of the reference of the art teacher to socialism? Why was the history teacher so openly hostile to Franco Spain? Who heard overtones of revolution in the English teacher's discussion of the Grapes of Wrath? What was behind the praise of Soviet progress in metallurgy in the chemistry class? Was it not "subversive" for the teacher to cast doubt on the wisdom of the venture in Korea?

What happens under this law is typical of what happens in a police state. Teachers are under constant surveillance; their pasts are combed for signs of disloyalty; their utterances are watched for clues to dangerous thoughts. A pall is cast over the classrooms. There can be no real academic freedom in that environment. Where suspicion fills the air and holds scholars in line for fear of their jobs, there can be no exercise of the free intellect. Supineness and dogmatism take he place of inquiry. A "party line"—as dangerous as the "party line" of the Communists lays hold. It is the "party line" of the orthodox view, of the conventional thought, of the accepted approach. A problem can no longer be pursued with impunity to its

edges. Fear stalks the classroom. The teacher is no longer a stimulant to adventurous thinking; she becomes instead a pipe line for safe and sound information. A deadening dogma takes the place of free inquiry. Instruction tends to become sterile; pursuit of knowledge is discouraged; discussion often leaves off where it should begin.

This, I think, is what happens when a censor looks over a teacher's shoulder. This system of spying and surveillance with its accompanying reports and trials cannot go hand in hand with academic freedom. It produces standardized thought, not the pursuit of truth. Yet it was the pursuit of truth which the First Amendment was designed to protect. A system which directly or inevitably has that effect is alien to our system and should be struck down. Its survival is a real threat to our way of life. We need be bold and adventuresome in our thinking to survive. A school system producing students trained as robots threatens to rob a generation of the versatility that has been perhaps our greatest distinction. The Framers knew the danger of dogmatism; they also knew the strength that comes when the mind is free, when ideas may be pursued wherever they lead. We forget these teachings of the First Amendment when we sustain this law.

Of course the school systems of the country need not become cells for Communist activities; and the classrooms need not become forums for propagandizing the Marxist creed. But the guilt of the teacher should turn on overt acts. So long as she is a law-abiding citizen, so long as her performance within the public school systems meets professional standards, her private life, her political philosophy, her social creed should not be the cause of reprisals against her.

ROBERT THOMPSON, as Chairman of the Communist Party of the State of New York, et al., Appellants, *v.* WILLIAM J. WALLIN et al., Constituting the Board of Regents of the University of the State of New York, Respondents.

In the Matter of CHARLES L'HOMMEDIEU et al., Appellants, against BOARD OF REGENTS OF THE UNIVERSITY OF THE STATE OF NEW YORK et al., Respondents.

ABRAHAM LEDERMAN, as President of Teachers Union of the City of New York, Local 555 of the United Public Workers, et al., Plaintiffs, and IRVING ADLER et al., Appellants, *v.* BOARD OF EDUCATION OF THE CITY OF NEW YORK, Respondent.

Argued October 11, 1950; decided November 30, 1950.

Constitutional Law—public schools—teachers and other school employees—subversive activities—(1) after enacting section 3021 of Education Law directing removal of public school teachers for seditious acts or utterances, section 12-a was added to Civil Service Law disqualifying from positions in public schools any who taught overthrow of Government by force; later by section 1 of chapter 360 of Laws of 1949, Legislature found that members of subversive groups and particularly of "communist party" had infiltrated into public schools despite statutes to prevent same and had used their positions to teach subversive doctrines; section 3022 (Feinberg Law), added to Education Law by chapter 360, provides for disqualification by Board of Regents of public school employees who violate section 3021 of Education Law or are ineligible under section 12-a of Civil Service Law; subdivision 2 of statute directs Board of Regents to list subversive organizations and states that membership in any such constitutes "prima facie evidence of disqualification" for such positions; statute

constitutional—(2) said law implements section 12-a of Civil Service Law and provides basis of disqualification for employment in public education, constitutional function of State; restrictive provisions of statute bear reasonable relation to purpose of safeguarding public schools—(3) constitutional rights to freedom of speech and press not absolute and do not deprive State of primary right of self-preservation; in view of declaration of findings by Legislature in preamble, statute not unreasonable or arbitrary exercise of police power nor does it unwarrantably infringe constitutional rights of free speech and assembly —(4) statute has no legal characteristics of bill of attainder despite motion of "communist party" as subversive in preamble thereto since preamble enacts nothing—(5) no lack of clarity in subdivision 2 directing listing of subversive organizations as set forth in section 12-a of Civil Service Law—(6) while membership in such organization deemed prima facie evidence of disqualification for employment, presumption disappears on offer of substantial evidence to contrary; no question of procedural due process —(7) no restriction in statute exceeding Legislature's constitutional power.

1. In 1917 the Legislature added to the Education Law present section 3021 directing the removal of superintendents, teachers and employees in the public schools for treasonable or seditious acts or utterances. In 1939 there was added to the Civil Service Law section 12-a which provided, *inter alia,* that no one should be appointed to or continued as superintendent or teacher in a public school who advocated or taught that the Government of the United States or of any State or political subdivision should be overthrown by force or who organized or became a member of any society or group teaching such doctrine. One

so dismissed or declared ineligible was entitled to a hearing on such charges and the burden of sustaining the order by a fair preponderance of credible evidence was on the person making the order. Ten years later by section 1 of chapter 360 of the Laws of 1949, the Legislature found that members of subversive groups and "particularly of the communist party" had infiltrated into the public schools despite the statutes designed to prevent such action and that members of such groups advocating violent overthrow of the Government used their position to advocate and teach subversive doctrines and, further, that to avert such infiltration the Board or Regents should be directed to meet the menace by affirmative action. To meet such conditions section 3022 (known as the Feinberg Law) was enacted by said chapter. It provides that the Board of Regents shall adopt and enforce rules and regulations for the disqualification of superintendents, teachers or employees in the public schools who violate the provisions of section 3021 of the Education Law or who are ineligible on any of the grounds set forth in section 12-a of the Civil Service Law. Subdivision 2 directs the Board of Regents to list the organizations which it finds to be subversive for teaching the violent overthrow of Government and provides that it may utilize similar listings promulgated by any Federal agency and that it shall provide that membership in any such organization shall constitute prima facie evidence of disqualification for appointment to or retention in any position in the public schools. Judgments and orders upholding the constitutionality of said section should be affirmed.

2. The Feinberg Law serves to implement section 12-a of the Civil Service Law in manner found by the Legislature to be expedient in view of the circumstances set forth in its preamble. It provides a basis of disqualification for

employment by State or municipal agencies of personnel essential to a constitutional function of the State, the education of its children. The judgment of the Legislature as expressed in the restrictive provisions of the statute bears a reasonable relation to the legislative purpose to safeguard the public school system.

3. The freedoms of speech and press guaranteed by the First Amendment to the Federal Constitution and those guaranteed by section 8 of article I of the State Constitution are not absolute and do not deprive the State of its primary right of self-preservation. Those freedoms do not sanction unbridled license. By enacting the Feinberg Law, the Legislature—acting within its province—has found and has declared that conditions—referred to in the preamble—did exist and required the adoption of statutory measures to protect public school children from subversive influences. Whether the danger envisaged was "clear and present" is answered by the Legislature's factual finding that an infiltration of members of subversive groups into employment in the public schools has occurred and that the consequence thereof is that subversive propaganda can be disseminated among children of tender years and that members of such groups use their office to teach such doctrines. The Feinberg Law is neither an unreasonable or arbitrary exercise of the police power nor does it unwarrantably infringe upon any constitutional right of free speech, assembly or association.

4. It is contended that the statute is a bill of attainder violative of section 9 of article I of the Federal Constitution, in that its preamble states that members of subversive groups "and particularly of the communist party" have infiltrated into public employment in the public schools. The preamble, however, enacts nothing, contains no direc-

tive and, indeed, was not made part of the Education Law. Provision is made for a hearing to be afforded any organization as to which an inquiry shall be instituted and no punishment is inflicted on any organization which, after hearing, the board shall find advocates the overthrow of Government by force or unlawful means. Any organization aggrieved by the board may, under the statute, bring a proceeding under article 78 of the Civil Practice Act.

5. There is no lack of clarity in the operative clause of subdivision 2 of said section 3022 which directs the board to list organizations found to be subversive for teaching the overthrow of Government by force.

6. Under subsdivision 2 no organization may be listed as subversive until after inquiry and appropriated hearing. While knowingly holding membership in such an organization shall constitute "prima facie evidence of disqualification" for tion disappears and thus the quoted phrase imports a hearing at which one who seeks appointment or retention is afforded an opportunity to present such evidence. Once such contrary evidence has been received, the official who made the order has the burden of sustaining the validity thereof and provisions for review are prescribed by section 12-a of the Civil Service Law. Consequently, there is no question of procedural due process.

7. There is no restriction in the statute which exceeds the Legislature's constitutional power.

Thompson v. *Wallin*, 276 App. Div. 463, affirmed.

Matter of L'Hommedieu v. *Board of Regents of Univ. of State of N. Y.*, 276 App. Div. 494, affirmed.

Lederman v. *Board of Educ. of City of N. Y.*, 276 App. Div. 527, affirmed.

APPEAL, in the first above entitled action, from a judgment in favor of defendants, entered March 15, 1950, upon an order of the Appellate Division of the Supreme Court in the third judicial department, which reversed, on the law, a judgment of the Supreme Court in favor of plaintiffs, entered in Albany County upon an order of the Court at Special Term (SHIRICK, J.; opinion 196 Misc. 686), granting judgment on the pleadings in favor of plaintiffs declaring unconstitutional chapter 360 of the Laws of 1949. The Appellate Division also declared said statute to be constitutional in all respects, and directed a dismissal of the complaint.

APPEAL, in the second above-entitled proceeding, from an order of the Appellate Division of the Supreme Court in the third judicial department, entered March 15, 1950, which reversed, on the law, an order of the Supreme Court at Special Term (SHIRICK, J.; opinion 196 Misc. 686), entered in Albany County, in a proceeding under article 78 of the Civil Practice Act granting a motion by petitioners for an order directing respondents, constituting the Board of Regents and others, from taking any action pursuant to chapter 360 of the Laws of 1949 and declaring said statute to be unconstitutional. The order of the Appellate Division appealed from directed a dismissal of the petition.

APPEAL, in the third above-entitled action, from a judgment in favor of defendant entered April 5, 1950, upon an order of the Appellate Division of the Supreme Court in the second judicial department, which reversed, on the law, a judgment of the Supreme Court in favor of plaintiffs-appellants, entered in Kings County upon an order of the court at Special Term (HEARN, J.; opinion 196 Misc. 873) granting a motion by said plaintiffs for judgment on the pleadings under rule 112 of the Rules of Civil Practice (1)

declaring unconstitutional subdivision (c) of section 12-a of the Civil Service Law as implemented by chapter 360 of the Laws of 1949, and subdivision 2 of section 3022 of the Education Law, and section 254 of chapter XV-B of the Rules of the Board of Regents, and (2) restrained respondent board from enforcing said statutes and rule. The Appellate Division denied plaintiffs' motion for judgment on the pleadings and dismissed the complaint.

Abraham Unger, Osmond K. Fraenkel, David M. Freedman and *Bernard Jaffe* for appellants in first above-entitled action. I. Chapter 360 of the Laws of 1949 is a bill of attainder, in violation of the Constitution of the United States (art. I, § 10). (*United States* v. *Lovett,* 328 U. S. 303; *American Communications Assn.* v. *Douds,* 339 U. S. 382; *Cummings* v. *Missouri,* 4 Wall. [U. S.] 277.) II. The Legislature has no constitutional right and lacks the legislative power to judge the doctrines of the Communist party or other organizations, to direct the Board of Regents to place them upon a subsersive list based upon its judgment of their doctrine, and to disqualify their members as public school teachers because of that doctrine (U. S. Const., 14th, 1st, 9th Amendts.; N. Y. Const., art. I, §§ 8, 9). (*Martin* v. *Hunter's Lessee,* 1 Wheat. [U. S.] 304; *M'Culloch* v. *Maryland,* 4 Wheat. [U. S.] 316; *West Virginia State Bd. of Educ.* v. *Barnette,* 319 U. S. 624; *United States* v. *Dennis,* 183 F. 2d 201; *Whitney* v. *California,* 274 U. S. 357; *Matter of Bridgman* v. *Kern,* 257 App. Div. 420; *Ex parte Milligan,* 4 Wall. [U. S.] 2; *De Jonge* v. *Oregon,* 299 U. S. 353.)

Frederic A. Johnson, Osmond K. Fraenkel, Fred G. Moritt and *Morris Eisenstein* for appellants in second above-entitled proceeding. The Feinberg Law rests judicial power over civil rights in an administrative body contrary

to the constitutional guarantees of due process and of equal protection of the laws, it is an *ex post facto* law; and, a bill of attainder. (*Whitney* v. *California*, 274 U. S. 357; *Palko* v. *Connecticut*, 302 U. S. 319; *Staten Is. Edison Corp.* v. *Maltbie*, 296 N. Y. 374; *Matter of Tompkins* v. *Board of Regents of Univ. of State of N. Y.*, 299 N. Y. 469; *Matter of Friedel* v. *Board of Regents of Univ. of State of N. Y.*, 296 N. Y. 347; *Adams* v. *United States ex rel. McCann*, 317 U. S. 269; *Kring* v. *Missouri*, 107 U. S. 221.)

Nathaniel L. Goldstein, Attorney-General (*Wendell P. Brown* and *Ruth Kessler Toch* of counsel), for respondents in first above-entitled action and second above-entitled proceeding. I. The standards for qualification as teachers in the public schools of this State are statutory, fixed by the Legislature which may, constitutionally, require as qualification, and declare as disqualification, factors other than scholastic, including, as a qualification, adherence to the form of Government of the United States, and as a disqualification, advocacy of the overthrow of the Government by force, violence or other unlawful means. (*Hawker* v. *New York*, 170 U. S. 189; *Patsone* v. *Pennsylvania*, 232 U. S. 138; *McAuliffe* v. *Mayor of New Bedford*, 155 Mass. 216; *United Public Workers* v. *Mitchell*, 330 U. S. 75; *American Communications Assn.* v. *Douds*, 339 U. S. 382; *United States* v. *Dennis*, 183 F. 2d 201; *People* v. *Crane*, 214 N. Y. 154, 239 U. S. 195; *Heim* v. *McCall*, 214 N. Y. 629, 239 U. S. 175; *Friedman* v. *Schwellenbach*, 159 F. 2d 22; *Washington* v. *Clark*, 84 F. Supp. 964; *Washington* v. *McGrath*, 182 F. 2d 375; *Matter of Rabouine* v. *McNamara*, 275 App. Div. 1052; *Matter of Koral* v. *Board of Educ. of City of N. Y.*, 197 Misc. 221; *Matter of Davis* v. *Impelliteri*, 197 Misc. 162; *Weinstock* v. *Ladisky*, 197 Misc. 859; *Barsky* v. *United States*, 167 F. 2d 241, 334 U. S. 843.)

II. The Feinberg Law does not infringe upon the freedoms guaranteed by the Constitution. Moreover, these freedoms are not absolute rights. They do not render the Government impotent to protect its existence as against those who advocate its overthrow by force. (*American Communications Assn.* v. *Douds*, 339 U. S. 382; *United States* v. *Dennis*, 183 F. 2d 201; *Gitlow* v. *New York*, 268 U. S. 652; *Whitney* v. *California*, 274 U. S. 357; *United States ex rel. Milwaukee Social Dem. Pub. Co.* v. *Burleson*, 255 U. S. 407; *Barsky* v. *United States*, 167 F. 2d 241, 334 U. S. 843. III. Courts will not substitute their judgment for that of the legislative arm of the Government as to the necessity or desirability of a statute. (*Johnson* v. *City of New York*, 274 N. Y. 411; *People* v. *Nebbia*, 262 N. Y. 259; *Schieffelin* v. *Goldsmith*, 253 N. Y. 243; *American Communications Assn.* v. *Douds*, 339 U. S. 382; *United States* v. *Petrillo*, 332 U. S. 1; *Secretary of Agric.* v. *Central Roig Refining Co.*, 338 U. S. 604.) IV. The Feinberg Law is constitutional under the "clear and present danger" test correctly applied. That test does not mean that legislative action may not be taken to deal with substantive threat to the nation's security before the danger is imminent. (*Dunne* v. *United States*, 138 F. 2d 137.) V. The Feinberg Law does not infringe in any respect upon the requirements of procedural due process. Moreover, no possible procedural problems in administration may be made the basis for attack upon the constitutionality of a statute itself. (*Minnesota ex rel. Pearson* v. *Probate Ct. of Ramsey Co.*, 309 U. S. 270; *American Power & Light Co.* v. *Securities & Exch. Comm.* 329 U. S. 90; *United States* v. *Petrillo*, 332 U. S. 1; *Matter of Newbrand* v. *City of Yonkers*, 285 N. Y. 164.)

Samuel M. Birnbaum and *Solomon Kreitman* for American Legion Department of New York, *amicus curiae*, in

support of respondents' position in first above-entitled action. I. Public office employment is not a right but a privilege. (*People* v. *Crane*, 214 N. Y. 154, 239 U. S. 195; *Heim* v. *McCall*, 214 N. Y. 629, 239 U. S. 175; *Atkin* v. *Kansas*, 191 U. S. 207.) II. The exclusion of teachers, etc., as defined in section 12-a of the Civil Service Law and section 3022 of the Education Law, from the public school system is a valid exercise of the police power of the State. (*Gitlow* v. *New York*, 268 U. S. 652; *Friedman* v. *Schwellenback*, 65 F. Supp. 254, 159 F. 2d 22; *McAuliffe* v. *Mayor of New Bedford*, 155 Mass. 216.) III. The fact that the Communist party may have received political recognition does not immunize it from an inquiry as to whether or not it constitutes a political movement which is subversive. (*Lockheed Aircraft Corp.* v. *Superior Corp. of Los Angeles Co.*, 171 P. 2d 21 [Cal.]; *Powell* v. *Unemployment Compensation Bd. of Review*, 22 A. 2d 43 [Pa.]; *Ex parte Hennen*, 13 Pet. [U. S.] 230; *White* v. *Berry*, 171 U. S. 366; *Ex parte Endo*, 323 U. S. 283; *Hirabayashi* v. *United States*, 320 U. S. 81; *Mencher* v. *Chesley*, 297 N. Y. 94; *Reiter* v. *American Legion*, 189 Misc. 1053, 273 App. Div. 757.) IV. The legislative policy set forth in the Feinberg Law is directed against all subversive movements. Its declaration with reference to the Communist party and certain of its affiliated organizations is supported by the courts, legislative findings and reports and many existing laws. (*United States ex rel. Yokinen* v. *Commissioner of Immigration*, 57 F. 2d 707; *United States ex rel. Fortmueller* v. *Commissioner of Immigration*, 14 F. Supp. 485; *United States ex rel. Vajtauer* v. *Commissioner of Immigration*, 273 U. S. 103; *United States ex rel. Georgian* v. *Uhl*, 271 F. 676; *United States ex rel. Turner* v. *Williams*, 194 U. S. 279.)

Arthur Garfield Hays and *Osmond K. Fraenkel* for appellants in third above-entitled action. I. The laws and

regulations interfere with freedom of speech, of the press, and of assembly. (*West Virginia State Bd. of Educ.* v. *Barnette*, 319 U. S. 624; *Stromberg* v. *California*, 283 U. S. 359; *Thomas* v. *Collins*, 323 U. S. 516; *Winters* v. *New York*, 333 U. S. 507; *Gitlow* v. *New York*, 268 U. S. 652; *United Public Workers* v. *Mitchell*, 330 U. S. 75; *United States* v. *Thayer*, 209 U. S. 39; *People* v. *Crane*, 214 N. Y. 154.) II. The presumption created by the Feinberg Law is unreasonabel and denies due process of law. (*Bailey* v. *Alabama*, 219 U. S. 219; *McFarland* v. *American Sugar Refining Co.*, 241 U. S. 79; *Manley* v. *Georgia*, 279 U. S. 1; *Tot* v. *United States*, 319 U. S. 463; *Pollock* v. *Williams*, 322 U. S. 4; *Mobile, J. & K. C. R. R. Co.* v. *Turnipseed*, 219 U. S. 35.)

John P. McGrath, Corporation Counsel (Michael A. Castaldi, Seymour B. Quel and *Morris Weissberg* of counsel), for respondent in third above-entitled action. I. The Feinberg Law and section 12-a of the Civil Service Law are within the constitutional power of the Legislature to regulate the efficiency and integrity of the public service and to secure the State's stability against incitements to insurrection or sedition by excluding from public service those who advocate or who are members of organizations which advocate the violent overthrow of the Government. (*United Public Workers* v. *Mitchell*, 330 U. S. 75; *People* v. *Crane*, 214 N. Y. 154; *Matter of Haslett* v. *Minetti*, 274 App. Div. 519; *Bailey* v. *Richardson*, 182 F. 2d 46; *Matter of Rabouine* v. *McNamara*, 275 App. Div. 1052; *Matter of Epstein* v. *Board of Educ. of City of N. Y.*, 162 Misc. 718, 255 App. Div. 745, 279, N. Y. 784; *Matter of McDowell* v. *Board of Educ. of City of N. Y.*, 104 Misc. 564; *People* v. *Sandstrom*, 279 N. Y. 523; *Matter of Summers*, 325 U. S. 561; *Matter of Cassidy*, 268 App. Div. 282, 296 N. Y. 926; *Ohio ex rel. Clarke* v. *Deckebach*, 274 U. S. 392; *United Steel Workers*

of America v. *National Labor Relations Bd.*, 170 F. 2d 247, 339 U. S. 382.) II. The Feinberg Law and section 12-a of the Civil Service Law do not deprive plaintiffs or any other person of freedom of speech, press or assembly. (*Cox v. New Hampshire*, 312 U. S. 569; *United States ex rel. Turner* v. *Williams*, 194 U. S. 279; *People* v. *Gitlow*, 234 N. Y. 132, 268 U. S. 652; *Whitney* v. *California*, 274 U. S. 357; *Dunne* v. *United States*, 138 F. 2d 137; *Schenck* v. *United States*, 249 U. S. 47; *Chaplinsky* v. *New Hampshire*, 315 U. S. 568.) III. The Feinberg Law and section 12-a of the Civil Service Law do not deprive plaintiffs or any other person of liberty or property without due process of law or of the equal protection of the laws. (*American Communications Assn.* v. *Douds*, 339 U. S. 382; *Whitney* v. *California*, 274 U. S. 357; *Dunne* v. *United States*, 138 F. 2d 137; *Cole* v. *Arkansas*, 338 U. S. 345; *Bi-Metallic Investment Co.* v. *State Bd. of Equalization of Colorado*, 239 U. S. 441; *Norwegian Nitrogen Products Co.* v. *United States*, 288 U. S. 294; *Bowles* v. *Willingham*, 321 U. S. 503; *Pittsburgh Plate Glass Co.* v. *National Labor Relations Bd.*, 313 U. S. 146.) IV. The Feinberg Law and section 12-a of the Civil Service Law are not bills of attainder or *ex post facto* laws, and do not violate the merit and fitness provisions of the New York Constitution. (*Cummings* v. *Missouri*, 4 Wall. [U. S.] 277; *McAuliffe* v. *Mayor of New Bedford*, 155 Mass. 216.)

Lewis, J. An appeal in each of these three cases presents for our decision the constitutionality of section 3022 of the Education Law (L. 1949, ch. 360) commonly known, and hereinafter referred to as the Feinberg Law.[10]

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[10] The following statement sets forth procedural steps taken prior to the present appeal to the Court of Appeals in each of the three cases under review:

(Footnote continued on following page)

At the outset the fact should be noted that prior to the enactment of the challenged statute, the Legislature had prescribed statutory standards governing within the State not only the conduct of teachers and other employees in the public school system but also those persons employed

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(Footnote continued from preceding page)

Thompson v. *Wallin* (276 App. Div. 463) is an action by the chairman and secretary of the "Communist Party of the State of New York" in which judgment is sought declaring the Feinberg Law unconstitutional and enjoining the defendant, the Board of Regents of the State of New York, from enforcing its provisions. At Special Term judgment on the pleadings was granted to the plaintiffs (196 Misc. 686). At the Appellate Division, Third Department, the judgment entered at Special Term was reversed on the law, the complaint was dismissed and judgment on the pleadings was granted to defendants declaring the statute constitutional.

Matter of L'Hommedieu v. *Board of Regents* (276 App. Div. 494) is a proceeding under article 78 of the Civil Practice Act by persons now or formerly employed in the public school system of the City of New York who seek an order directing the defendants, Board of Regents and others "to disregard Chapter 360 of the Laws of 1949 [Feinberg Law], and to cease and desist from taking any steps toward the enforcement of the provisions of said law * * *and to treat said enactment as a nullity * * *." At Special Term the statute was declared unconstitutional and the relief sought by the petitioners was granted (196 Misc. 686). At the Appellate Division, Third Department, the order of Special Term was reversed on the law and the petition dismissed.

Lederman v. *Board of Education of City of New York* (276 App. Div. 527) is an action by Teachers Union, Local 555 of the United Public Workers, and others, in which judgment against the defendant Board of Education is sought declaring the Feinberg Law and section 12-a of the Civil Service Law and the rules and accompanying memorandum issued by the Commissioner of Education, be declared unconstitutional and enjoining the defendant board and its agents from taking any action based upon said statutes, rules or memorandum. At Special Term the statutes, rules and memorandum thus challenged were declared unconstitutional and the plaintiffs were granted judgment on the pleadings (196 Misc. 873). At The Appellate Division, Second Department, the judgment entered at Special Term, insofar as appealed from, was reversed on the law, the motion for judgment on the pleadings was denied, and the complaint was dismissed.

throughout the broad field of State civil service. Thus we find that by the Laws of 1917, chapter 416, there was added to the Education Law, section 3021 (formerly § 568) which provides:

"§ 3021. *Removal of superintendents, teachers and employees for treasonable or seditious acts or utterances.* A person employed as superintendent of schools, teacher or employee in the public schools, in any city or school district of the state, shall be removed from such position for the utterance of any treasonable or seditious word or words or the doing of any treasonable or seditious act or acts while holding such position."

Thereafter, the Legislature, by the Laws of 1939, chapter 547, added to the Civil Service Law, section 12-a which now provides:

"12-a. *Ineligibility.* No person shall be appointed to any office or position in the service of the state or of any civil division or city thereof, nor shall any person presently employed in any such office or position be continued in such employment, nor shall any person be employed in the public service as superintendents, principals or teachers in a public school or academy or in a state normal school or college, or any other state educational institution who: (a) By word of mouth or writing wilfully and deliberately advocates, advises or teaches the doctrine that the government of the United States or of any state or of any political subdivision thereof should be overthrown or overturned by force, violence or any unlawful means; or

"(b) Prints, publishes, edits, issues or sells, any book, paper, document or written or printed matter in any form containing or advocating, advising or teaching the doctrine that the government of the United States or of any state or

of any political subdivision thereof should be overthrown by force, violence or any unlawful means, and who advocates, advises, teaches, or embraces the duty, necessity or propriety of adopting the doctrine contained therein;

"(c) Organizes or helps to organize or becomes a member of any society or group of persons which teaches or advocates that the government of the United States or of any state or of any political subdivision thereof shall be overthrown by force or violence, or by any unlawful means;

"(d) A person dismissed or declared ineligible may within four months of such dismissal or declaration of ineligibility be entitled to petition for an order to show cause signed by a justice of the supreme court, why a hearing on such charges should not be had. Until the final judgment on said hearing is entered, the order to show cause shall stay the effect of any order of dismissal or ineligibility based on the provisions of this section. The hearing shall consist of the taking of testimony in open court with opportunity for cross examination. The burden of sustaining the validity of the order of dismissal or ineligibility by a fair preponderance of the credible evidence shall be upon the person making such dismissal or order of ineligibility."

It was ten years later—in 1949—that the Legislature found within the State conditions existing which so adversely affected the public schools as to prompt the enactment of the Feinberg Law. The following statement by the Legislature—which prefaces the three operative sections of the statute—is declaratory of conditions found by the Legislature which prompted the enactment:

"Section 1. The legislature hereby finds and declares that there is common report that members of subversive groups, and particularly of the communist party and certain of its affiliated organizations, have infiltrated into

public employment in the public schools of the state. This has occurred and continues despite the existence of statutes designed to prevent the appointment to or the retention in employment in public office and particularly in the public schools of the state of members of any organization which teaches or advocates that the government of the United States or of any state or of any political subdivision thereof shall be overthrown by force or violence or by any unlawful means. The consequence of any such infiltration into the public schools is that subversive propaganda can be disseminated among children of tender years by those who teach them and to whom the children look for guidance, authority and leadership. The legislature finds that members of such groups frequently use their office or position to advocate and teach subversive doctrines. The legislature finds that members of such groups are frequently bound by oath, agreement, pledge or understanding to follow, advocate and teach a prescribed party line or group dogma or doctrine without regard to truth or free inquiry. The legislature finds that such dissemination of propaganda may be and frequently is sufficiently subtle to escape detection in the classroom. It is difficult, therefore, to measure the menace of such infiltration in the schools by conduct in the classroom. The legislature further finds and declares that in order to protect the children in our state from such subversive influence it is essential that the laws prohibiting persons who are members of subversive groups, such as the communist party and its affiliated organizations, from obtaining or retaining employment in the public schools, be rigorously enforced. The legislature deplores the failure heretofore to prevent such infiltration which threatens dangerously to become a commonplace in our schools. To this end, the board of regents, which is charged primarily with the responsibility of supervising the public school

systems in the state, should be admonished and directed to take affirmative action to meet this grave menace and to report thereon regularly to the state legislature."[11]

To meet conditions thus found to exist and as a preventive measure against the dissemination of subversive propaganda among children in the public schools the Legislature enacted the Feinberg Law which is now the subject of attack by the appellants as violating provisions of both the Federal and State Constitutions. The law thus challenged, which the Laws of 1949, chapter 360, added to the Education Law as section 3022, provides as follows:

"§3022. *Elimination of subversive persons from the public school system.* 1. The board of regents shall adopt, promulgate, and enforce rules and regulations for the disqualification or removal of superintendents of schools, teachers or employees in the public schools in any city or school district of the state who violate the provisions of section three thousand twenty-one of this article or who are ineligible for appointment to or retention in any office or position in such public schools on any of the grounds set forth in section twelve-a of the civil service law and shall provide therein appropriate methods and procedure for the enforcement of such sections of this article and the civil service law.

"2. The board of regents shall, after inquiry, and after such notice and hearing as may be appropriate, make a listing of organizations which it finds to be subversive in that they advocate, advise, teach or embrace the doctrine that the government of the United States or of any state or of any political subdivision thereof shall be overthrown

[11] Reference to the Session Laws of 1949 will disclose that the prefatory declaration of the legislative purpose—section 1 of chapter 360 of the Laws of 1949—is not made a part of the Education Law.

or overturned by force, violence or any unlawful means, or that they advocate, advise, teach or embrace the duty, necessity or propriety of adopting any such doctrine, as set forth in section twelve-a of the civil service law. Such listings may be amended and revised from time to time. The board, in making such inquiry, may utilize any similar listings or designations promulgated by any federal agency or authority authorized by federal law, regulation or executive order, and for the purposes of such inquiry, the board may request and receive from such federal agencies or authorities any supporting material or evidence that may be made available to it. The board of regents shall provide in the rules and regulations required by subdivision one hereof that membership in any such organization included in such listing made by it shall constitute *prima facie* evidence of disqualification for appointment to or retention in any office or position in the public schools of the state.

"3. The board of regents shall annually, on or before the fifteenth day of February, by separate report, render to the legislature, a full statement of measures taken by it for the enforcement of such provisions of law and to require compliance therewith. Such reports shall contain a description of surveys made by the board of regents, from time to time, as may be appropriate, to ascertain the extent to which such provisions of law have been enforced in the city and school districts of the state. * * *"

In considering the criticism which the appellants level at the Feinberg Law we may not, of course, substitute our judgment for that of the Legislature as to the wisdom or expediency of the legislation. To do so would transcend limits of our field of inquiry. (*American Communications Assn.* v. *Douds*, 339 U. S. 382, 400-401; *People* v. *Nebbia*, 262 N. Y. 259, 271.) Within those limits we examine the challenged law to determine whether, as claimed by the

appellants, either the Federal or State Constitution is violated by provisions in the statute that membership in any organization, which the Board of Regents—after inquiry, notice and hearing—shall find and list as advocating the overthrow of the government by violence or unlawful means, shall be *prima facie* evidence of disqualification for appointment or retention in the service of the public school system.

In considering the several grounds of constitutional attack we are mindful that the Feinberg Law serves to implement section 12-a of the Civil Service Law (quoted *supra*)—an implementation found by the Legislature to be expedient in view of certain existing circumstances which, as we have seen, the law-making body was careful to set forth in its declaration of legislative purpose. Such implementation, we note, prescribes a basis of *disqualification for employment* by State and municipal agencies of personnel essential to a constitutional function of the State—the education of its children. (N. Y. Const., art. XI, § 1.) We are also mindful that a public employee has no vested, proprietary right to his position which transcends the public interest or the general welfare of the community he serves. In other words public employment as a teacher is not an uninhibited privilege. True, there are limitations upon those grounds upon which public employment may be denied—for example an applicant's religion. It does not follow, however, that the statutory proscription against membership in an organization which subscribes to subversive tenets or advocates the overthrow of government by violence or unlawful means may not be a legal basis for denying an application for public employment as a teacher, or for terminating such employment for cause after inquiry, due notice and hearing.

Concerned, as we are, with the qualification for public employment in the vital field of education, we regard the

law here challenged as an effort by the Legislature to insert a new strand in the mesh by which a screening process is accomplished in the selection of those who teach the State's children. Strands which serve a like purpose are found in section 3002 of the Education Law, which denies to any person the right to serve as a teacher in a public school until he or she shall have taken and subscribed an oath to support the Federal and State Constitutions; also in section 801 *id.*, which requires that in all public schools instruction shall be given in "patriotism and citizenship". As the Legislature has authority over the discipline and efficiency of public service, we think its judgment, as expressed in the restrictive provisions of the statute under review, bears a reasonable relation to the legislative purpose to safeguard the public school system. (See *United Public Workers* v. *Mitchell,* 330 U. S. 75, 100; *American Communications Assn.* v. *Douds, supra,* p. 405; *New York ex rel. Bryant* v. *Zimmerman,* 278 U. S. 63, 72-73; *Patsone* v. *Pennsylvania,* 232 U. S. 138, 144; *Hawker* v. *New York,* 170 U. S. 189, 192-197.) Those cases stand for the legal principle which prompted Judge HOLMES—as he then was—to write in *McAuliffe* v. *Mayor of New Bedford* (155 Mass. 216, 220), the familiar statement: "The petitioner may have a constitutional right to talk politics, but he has no constitutional right to be a policeman."

Passing to the appellants' claim that the disqualification for employment in the State's public school system, prescribed by section 12-a of the *Civil Service Law* as implemented by the Feinberg Law, is incompatible with freedoms guaranteed by the First Amendment to the Federal Constitution and those guaranteed by section 8 of article I of the State Constitution: We know that the freedoms which the appellants now invoke are not absolute and that they do not deprive the State of its primary right to self-preserva-

tion. We are also aware that those freedoms do not sanction unbridled license. (*People* v. *Gitlow*, 234 N. Y. 132, 137, affd. *sub nom. Gitlow* v. *New York*, 268 U. S. 652, 666-667; *Schenck* v. *United States*, 249 U. S. 47, 52.) Indeed "* * * it has long been established that those freedoms themselves are dependent upon the power of constitutional government to survive. If it is to survive it must have power to protect itself against unlawful conduct and, under some circumstances, against incitements to commit unlawful acts." (*American Communications Assn.* v. *Douds, supra*, p. 394.) When *People* v. *Gitlow* (*supra*), reached the Supreme Court of the United States the opinion there written contained the following statements which are apposite to this phase of our inquiry (pp. 666-668):

"It is a fundamental principle, long established, that the freedom of speech and of the press which is secured by the Constitution, does not confer an absolute right to speak or publish, without responsibility, whatever one may choose, or an unrestricted and unbridled license that gives immunity for every possible use of language and prevents the punishment of those who abuse this freedom. * * * Reasonably limited, it was said by Story * * * this freedom is an inestimable privilege in a free government; without such limitation, it might become the scourge of the republic.

"That a State in the exercise of its police power may punish those who abuse this freedom by utterances inimical to the public welfare, tending to corrupt public morals, incite to crime, or disturb the public peace, is not open to question. * * * Thus it was held by this Court in the *Fox Case* [236 U. S. 273], that a State may punish publications advocating and encouraging a breach of its criminal laws; and, in the *Gilbert Case* [254 U. S. 325], that a State may punish utterances teaching or advocating that its citizens

should not assist the United States in prosecuting or carrying on war with its public enemies.

"And, for yet more imperative reasons, a State may punish utterances endangering the foundations of organized government and *threatening its overthrow by unlawful means. These imperil its own existence as a constitutional State. Freedom of speech and press,* said Story (*supra*) *does not protect disturbances to the public peace or the attempt to subvert the government. It does not protect publications or teachings which tend to subvert or imperil the government or to impede or hinder it in the performance of its governmental duties.* * * * *It does not protect publications prompting to overthrow of government by force;* the punishment of those who publish articles which tend to destroy organized society being essential to the security of freedom and the stability of the State. * * * And *a State may penalize utterance which openly advocate the overthrow of the representative and constitutional form of government of the United States and the several States, by violence or other unlawful means.* * * * *In short this freedom does not deprive a State of the primary and essential right of self preservation; which, so long as human governments endure, they cannot be denied.*" (Emphasis supplied.) See also, *Cox* v. *New Hampshire,* 312 U. S. 569, 574; *Gilbert* v. *Minnesota,* 254 U. S. 325, 332, 339; *Schenck* v. *United States, supra,* p. 52; *Fox* v. *Washington,* 236 U. S. 273, 276-277; *Patterson* v. *Colorado,* 205 U. S. 454, 462; *United States ex rel. Turner* v. *Williams,* 194 U. S. 279, 294; *Robertson* v. *Baldwin,* 165 U. S. 275, 281; *People* v. *Most,* 171 N. Y. 423, 431.)

In the three cases now before us it was obviously within the province of the Legislature to decide in the first instance whether conditions prevailed within the State which

threatened the wellbeing of its public school system and called for some protective measure. By enacting the Feinberg Law the Legislative has found and has declared that conditions—referred to in the preamble to the statute in suit—did exist and were of such a character as to require the adoption of statutory measures which will protect public school children from subversive influences. "That determination must be given great weight. Every presumption is to be indulged in favor of the validity of the statute, *Mugler* v. *Kansas*, 123 U. S. 623, 661; and it may not be declared unconstitutional unless it is arbitrary or unreasonable attempt to exercise the authority vested in the State in the public interest." (*Whitney* v. *California*, 274 U. S. 357, 371.) Paraphrasing what was written in *Gitlow* v. *New York* (268 U. S. 652, 669, *supra*), we cannot say, in view of circumstances set forth in the preamble to the statute, that the Legislature acted arbitrarily or unreasonably when, in the exercise of its judgment as to measures necessary to protect the public school system, it sought "to extinguish the spark without waiting until it has enkindled the flame * * *; but it may, in the exercise of its judgment, suppress the threatened danger in its incipiency."

Whether that danger was "clear and present"—within the rule of *Schenck* v. *United States* (*supra*, p. 52) as interpreted and applied in *American Communications Assn.* v. *Douds* (*supra*, pp. 393-400)—is answered by the Legislature's factual finding that an infiltration of members of subversive groups into employment in the public schools of the State has occurred and continues; that the consequence of such infiltration is that subversive propaganda can be disseminated among children of tender years by those who teach them and to whom the children look for guidance, authority and leadership; and that members of such groups

frequently use their office or position to advocate and teach subversive doctrines.

Giving the Legislature's declaration of findings and purpose the weight to which it is entitled, we cannot say, upon the records before us, that the Feinberg Law is an unreasonable or arbitrary exercise of the police power of the State; nor can we say that it unwarrantably infringes upon any constitutional right of free speech, assembly or association.

The appellants also contend that the Feinberg Law is a bill of attainder and that, as such, it violates section 9 of article I of the Federal Constitution. As a basis for that assertion the appellants note the facts, stated in the preamble of the statute (*supra*) as findings by the Legislature, that there is common report that members of subversive groups "and particularly of the communist party" have infiltrated into public employment in the public schools of the State; that members of such groups frequently use their position to advocate and teach subversive doctrines, and in consequence that subversive propaganda can be disseminated among children in attendance at the public schools.

A bill of attainder has been defined as "* * * a legislative act which inflicts punishment without a judicial trial." (*Cummings* v. *Missouri*, 4 Wall. [U. S.] 277, 323.) By basing their argument upon excerpts from the preamble of the Feinberg Law appellants rely upon what is clearly a prefatory statement by which the Legislature has declared its purpose in adding new section 3022 to the Education Law. Such preamble enacts nothing, contains no directives and, as we have seen, is not made a part of the Education Law. (*Pumpelly* v. *Village of Owego*, 45 How. Prac. 219, 257.) Furthermore, a textual examination of the provisions

of Feinberg Law—section 3022—in the light of the above-quoted definition of a bill of attainder, discloses that no organization is named in the body of the act where are prescribed the steps to be taken by the Board of Regents in listing organizations which it finds to be subversive. The text also makes provisions for a hearing to be had on appropriate notice, which hearing is afforded any organization as to which the Board of Regents shall determine to institute an inquiry. It is also clear that no punishment is inflicted upon any organization which the Board of Regents—after hearing—shall find advocates the overthrow of government by force or unlawful means. (*Cf. American Communications Assn.* v. *Douds, supra,* pp. 413-414.) In the event such an organization is aggrieved by action taken by the Board of Regents under the statute, such action may be the subject of a proceeding under article 78 of the Civil Practice Act. We are thus led to conclude that the Feinberg Law has none of the legal characteristics of a bill of attainder.

There is also an assertion by the appellants that the statute is unconstitutionally vague. We find no lack of clarity in the operative clause to be found in subdivision 2 of section 3022, which directs the Board of Regents, after inquiry, notice and hearing, to list "organizations which it finds to be subversive in that they advocate, advise, teach or embrace the doctrine that the government of the United States or of any state or of any political subdivision thereof shall be overthrown or overturned by force, violence or any unlawful means, or that they advocate, advise, teach or embrace the duty, necessity or propriety of adopting any such doctrine, as set forth in section twelve-a of the civil service law."

Under subdivision 2 of the statute no organization may be listed by the Board of Regents as subversive until "af-

ter inquiry, and after such notice and hearing as may be appropriate". The statute also makes it clear that, when it appears that one who seeks to establish or retain employment in the State public school system knowingly holds membership in an organization named upon any listing for which subdivision 2 of section 3022 makes provision, proof of such membership "shall constitute *prima facie* evidence of disqualification" for such employment. But, as was said in *Potts* v. *Pardee* (220 N. Y. 431, 433): "The presumption growing out of a *prima facie* case * * * remains only so long as there is no substantial evidence to the contrary. When that is offered the presumption disappears, and unless met by further proof there is nothing to justify a finding based solely upon it." Thus the phrase "*prima facie* evidence of disqualification", as used in the statute, imports a hearing at which one who seeks appointment to or retention in a public school position shall be afforded an opportunity to present substantial evidence contrary to the presumption sanctioned by the *prima facie* evidence for which subdivision 2 of section 3022 makes provision. Once such contrary evidence has been received, however, the official who made the order of ineligibility has thereafter the burden of sustaining the validity of that order by a fair preponderance of the evidence. (Civil Service Law, § 12-a, subd. [d].) Should an order of ineligibility then issue, the party aggrieved thereby may avail himself of the provisions for review prescribed by the section of the statute last cited above. In that view there here arises no question of procedural due process. Reading the statute in that way, as we do, we cannot say there is no rational relation between the legislative findings which prompted the enactment of the Feinberg Law and the measures prescribed therein to safeguard the public school system of the State.

We have seen that the Legislature and administrative agencies have authority over the discipline and efficiency of the public service. When in its judgment and discretion the Legislature finds acts by public employees which threaten the integrity and competency of a governmental service such as the public school system, legislation adequate to maintain the usefulness of the service affected is necessarily required to forestall such danger. Believing the Feinberg Law to be the Legislature's answer to such a need, we find in that statute no restriction which exceeds the Legislature's constitutional power.

The judgments and order should be affirmed, with costs.

LOUGHRAN, Ch. J., CONWAY, DESMOND, DYE, FULD and FROESSEL, JJ., concur.

Judgment accordingly.

Appendix C

STATUTES INVOLVED and RULES OF THE BOARD OF REGENTS

Civil Service Law

§ 105.[1] *Subversive activities; disqualification.* 1. Ineligibility of persons advocating overthrow of government by force or unlawful means. No person shall be appointed to any office or position in the service of the state or of any civil division thereof, nor shall any person employed in any such office or position be continued in such employment, nor shall any person be employed in the public service as superintendent, principal or teacher in a public

[1] Former § 12-a; renumbered L. 1958, ch. 790.

school or academy or in a state college or any other state educational institution who:

(a) by word of mouth or writing wilfully and deliberately advocates, advises or teaches the doctrine that the government of the United States or of any state or of any political subdivision thereof should be overthown or overturned by force, violence or any unlawful means; or

(b) prints, publishes, edits, issues or sells, any book, paper, document or written or printed matter in any form, containing or advocating, advising or teaching the doctrine that the government of the United States or of any state or of any political subdivision thereof should be overthrown by force, violence or any unlawful means, and who advocates, advises, teaches, or embraces the duty, necessity or propriety of adopting the doctrine contained therein; or

(c) organizes or helps to organize or becomes a member of any society or group of persons which teaches or advocates that the government of the United States or of any state or of any political subdivision thereof shall be overthrown by force or violence, or by any unlawful means.

For the purposes of this section, membership in the communist party of the United States of America or the communist party of the state of New York shall constitute *prima facie* evidence of disqualification for appointment to or retention in any office or position in the service of the state or of any city or civil division of thereof.[2]

2. A person dismissed or declared ineligible pursuant to his position with pay for the period of such suspension or declaration of ineligibility be entitled to petition for an order to show cause signed by a justice of the supreme

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[2] Added to § 12-a (c), L. 1958, ch. 503. See § 1 of ch. 503, Declaration of Intent of the new paragraph of subdivision (c).

court, why a hearing on such charges should not be had. Until the final judgment on said hearing is entered, the order to show cause shall stay the effect of any order of dismissal or ineligibility based on the provisions of this section; provided, however, that during such stay a person so dismissed shall be suspended without pay, and if the final determination shall be in his favor he shall be restored to his position with pay for the period of such suspension less the amount of compensation which he may have earned in any other employment or occupation and any unemployment insurance benefits he may have received during such period. The hearing shall consist of the taking of testimony in open court with opportunity for cross examination. The burden of sustaining the validity of the order of dismissal or ineligibility by a fair preponderance of the credible evidence shall be upon the person making such dismissal or order of ineligibility.

3. Removal for treasonable or seditious acts or utterances. A person in the civil service of the state or of any civil division thereof shall be removable therefrom for the utterance of any treasonable or seditious word or words or the doing of any treasonable or seditious act or acts while holding such position. For the purpose of this subdivision, a treasonable word or act shall mean "treason", as defined in the penal law; a seditious word or act shall mean "criminal anarchy" as defined in the penal law.[3]

Laws of 1958, chapter 503

Section 1. Declaration of legislative intent. The legislature takes cognizance that section three thousand twenty-two of the education law makes provision for the imple-

[3] Former § 23-a transferred to § 105 as subdivision 3 thereof, L. 1958, ch. 790. Second sentence added new. Penal Law definitions in § 2380 and § 160 respectively.

mentation and enforcement of section twelve-a of the civil service law with respect to the elimination of subversive persons from the public school system; that such section three thousand twenty-two authorizes the board of regents, after notice and hearing, to list "organizations which it finds to be subversive in that they advocate, advise, teach or embrace the doctrine that the government of the United States or of any state or of any political subdivision thereof shall be overthown or overturned by force, violence or any unlawful means, or that they advocate, advise, teach or embrace the duty, necessity or propriety of adopting any such doctrine, as set forth in section twelve-a of the civil service law"; that the board of regents, after notice and hearing, has so listed the communist party of the United States of America and the communist party of the state of New York; and that pursuant to such section three thousand twenty-two and rules and regulations adopted thereunder membership in either such organization constitutes *prima facie* evidence of disqualifiation for appointment to or retention in any office or position in the public schools of the state. It is the intent of the legislature to apply to all officers and employees subject to section twelve-a of the civil service law the same provision that membership in either of such organizations shall constitute *prima facie* evidence of disqualification for appointment or continued employment.

Education Law

§ 3021. *Removal of superintendents, teachers and employees for treasonable or seditious acts or utterances.* A person employed as superintendent of schools, teacher or employee in the public schools, in any city or school district of the state, shall be removed from such position for the utterance of any treasonable or seditious word or

words or the doing of any treasonable or seditious act or acts while holding such position.

§ 3022. *Elimination of subversive persons from the public school system.* 1. The board of regents shall adopt, promulgate, and enforce rules and regulations for the disqualification or removal of superintendents of schools, teachers or employees in the public schools in any city or school district of the state and the faculty members and all other personnel and employees of any college or other institution of higher education owned and operated by the state or any subdivision thereof[4] who violate the provisions of sections three thousand twenty-one of this article or who are ineligible for appointment to or retention in any office or position in such public schools or such institutions of higher education[4] on any of the grounds set forth in section twelve-a[5] of the civil serivce law and shall provide therein appropriate methods and procedure for the enforcement of such sections of this article and the civil service law.

2. The board of regents shall, after inquiry, and after such notice and hearing as may be appropriate, make a listing of organizations[5] which it finds to be subversive in that they advocate, advise, teach or embrace the doctrine that the government of the United States or of any state or of any political subdivision thereof shall be overthrown or overturned by force, violence or any unlawful means, or that they advocate, advise, teach or embrace the duty, necessity or propriety of adopting any such doctrine, as set forth in section twelve-a[6] of the civil service law. Such listings

[4] Underlined matter added L. 1953, ch. 681; effective April 13, 1953.

[5] The Regents on September 24, 1953 listed, after notice and extensive hearings, the Communist Party of the United States of America and the Communist Party of the State of New York.

may be amended and revised from time to time. The board, in making such inquiry, may utilize any similar listings or designations promulgated by any federal agency or authority authorized by federal law, regulation or executive order, and for the purposes of such inquiry, the board may request and receive from such federal agencies or authorities any supporting material or evidence that may be made available to it. The board of regents shall provide in the rules and regulations required by subdivision one hereof that membership in any such organization included in such listing made by it shall constitute *prima facie* evidence of disqualification for appointment to or retention in any office or position in the public schools of the state.

3. The board of regents shall annually, on or before the fifteenth day of February, by separate report, render to the legislature, a full statement of measures taken by it for the enforcement of such provisions of law and to require compliance therewith. Such reports shall contain a description of surveys made by the board of regents, from time to time, as may be appropriate, to ascertain the extent to which such provisions of law have been enforced in the city and school districts of the state.

Rules of the Board of Regents
(Adopted July 15, 1949)

Article XVIII

Subversive Activities

Section 244. *Disqualification or removal of superintendents, teachers and other employes.*

1. The school authorities of each school district shall take all necessary action to put into effect the following procedures for disqualification or removal of superintendents, teachers or other employes who violate the provisions

of section 3021 of the Education Law or section 12-a[6] of the Civil Service Law.

a. Prior to the appointment of any superintendent, teacher or employe, the nominating official, in addition to making due inquiry as to the candidate's academic record, professional training, experience and personal qualities, shall inquire of prior employers, and such other persons as may be in a position to furnish pertinent information, as to whether the candidate is known to have violated the aforesaid statutory provisions, including the provisions with respect to membership in organizations listed by the Board of Regents as subversive in accordance with paragraph 2 hereof. No person who is found to have violated the said statutory provisions shall be eligible for employment.

b. The school authorities shall require one or more of the officials in their employ, whom they shall designate for such purpose, to submit to them in writing not later than October 31, 1949, and not later than September 30th of each school year thereafter, a report on each teacher or other employe. Such report shall either (1) state that there is no evidence indicating that such teacher or other employe has violated the statutory provisions herein referred to, including the provisions with respect to membership in organizations listed by the Regents as subversive in accordance with paragraph 2 hereof; or (2) where there is evidence indicating a violation of said statutory provisions, including membership in such a subversive organization, recommend that action be taken to dismiss such teacher or other employe, on the ground of a specified violation or violations of the law.

[6] Now section 105.

c. The school authorities shall themselves prepare such reports on the superintendent of schools and such other officials as may be directly responsible to them, including the officials designated by them in accordance with subdivision b of this paragraph.

d. The school authorities shall proceed as promptly as possible, and in any event within 90 days after the submission of the recommendations required in subdivision b of this paragraph, either to prefer formal charges against superintendents, teachers or other employes for whom the evidence justified such action, or to reject the recommendations for such action.

e. Following the determination required in subdivision d of this paragraph, the school authorities shall immediately institute proceedings for the dismissal of superintendents, teachers or other employes in those cases in which in their judgment the evidence indicates violation of the statutory provisions herein referred to. In proceedings against persons serving on probation or those having tenure, the appropriate statutory procedure for dismissal shall be followed. In proceedings against persons serving under contract and not under the provisions of a tenure law, the school authorities shall conduct such hearings on charges as they deem the exigencies warrant, before taking final action on dismissal. In all cases all rights to a fair trial, representation by counsel and appeal or court review as provided by statute or the Constitution shall be scrupulously observed.

2. Pursuant to chapter 360 of the Laws of 1949, the Board of Regents will issue a list, which may be amended and revised from time to time, of organizations which the Board finds to be subversive in that they advocate, advise, teach or embrace the doctrine that the Government of the

United States, or of any state or of any political subdivision thereof, shall be overthrown or overturned by force, violence or any unlawful means, or that they advocate, advise, teach or embrace the duty, necessity or propriety of adopting any such doctrine, as set forth in section 12a[7] of the Civil Service Law. Evidence of membership in any organization so listed on or after the tenth day subsequent to the date of official promulgation of such list shall constitute *prima facie* evidence of disqualification for appointment to or retention of any office or position in the school system. Evidence of membership in such an organization prior to said day shall be presumptive evidence that membership has continued, in the absence of a showing that such membership has been terminated in good faith.

3. On or before the first day of December of each year, the school authorities of each school district shall render to the Commissioner of Education a full report, officially adopted by the school authorities and signed by their presiding officer, of the measures taken by them for the enforcement of these regulations during the calendar year ending on the 31st day of October preceding. Such report shall include a statement as to (a) the total number of superintendents, teachers and other employes in the employ of the school district; (b) the number of superintendents, teachers and other employes as to whom the school authorities and/or the officials designated by them have reported that there is no evidence indicating that such employes have violated the statutory provisions herein referred to, including the provisions with respect to membership in organizations listed by the Regents as subversive; and (c) the number of superintendents, teachers and other employes in whose cases the school authorities and/or

[7] Now section 105.

the officials designated by them have recommended that action be taken to dismiss the employes in question, on the grounds of specified violations of the law or evidence of membership in a subversive organization. Such report shall also include, for the group listed under (c) above, a statement of (d) the number of cases in which charges have been or are to be preferred and the status or final disposition of each of these cases; (e) the number of cases in which the school authorities have concluded that the evidence reported by the designated officials does not warrant the preferring of charges; and (f) the number of cases in which the school authorities have not determined, as of October 31st of the school year in question, on the action to be taken.

4. Immediately upon the finding by school authorities that any person is disqualified for appointment or retention in employment under these regulations, said school authorities shall report to the Commissioner of Education the name of such person and the evidence supporting his disqualification, including a transcript of the official records of hearings on charges, if any, which have been conducted.

REPLY

BRIEF

IN THE

Supreme Court of the United States

October Term, 1966

No. ~~1226~~ 105

HARRY KEYISHIAN, GEORGE HOCHFIELD, NEWTON GARVER, RALPH N. MAUD and GEORGE STARBUCK,

Appellants,

vs.

THE BOARD OF REGENTS OF THE UNIVERSITY OF THE STATE OF NEW YORK, BOARD OF TRUSTEES OF THE STATE UNIVERSITY OF NEW YORK, STATE UNIVERSITY OF NEW YORK AT BUFFALO, SAMUEL B. GOULD, CLIFFORD C. FURNAS, J. LAWRENCE MURRAY, ARTHUR LEVITT, DEPARTMENT OF CIVIL SERVICE OF THE STATE OF NEW YORK, CIVIL SERVICE COMMISSION OF THE STATE OF NEW YORK, MARY GOODE KRONE, and ALEXANDER A. FALK,

Appellees.

On Direct Appeal from the Final Judgment of a Three Judge United States District Court Sitting in the Western District of New York

ANSWER TO MOTIONS TO DISMISS OR AFFIRM

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Appellees.

ON DIRECT APPEAL FROM THE FINAL JUDGMENT OF A THREE JUDGE UNITED STATES DISTRICT COURT SITTING IN THE WESTERN DISTRICT OF NEW YORK

ANSWER TO MOTIONS TO DISMISS OR AFFIRM

Appellants, in support of their statement that substantial questions are presented make the following points in reply to the appellees' motions to dismiss or affirm.

Point I

Appellees in their motions to dismiss, make claim that statutes, administrative rules and procedures, involved in this law suit merely prescribe a designation for employment tightly keyed to knowing advocacy of the doctrine that the Government of the United States should be overthrown by force or violence and that the Fineburg Law is

designed merely to implement this disqualification in the university system of the State.

However, even a casual reading of the statutes involved indicate that they go far beyond this relatively definable behavior. The sweep of the statutes is measured by the requirement that no person shall be appointed to or retained in the public service of the State of New York who:

> "Prints, publishes, edits, issues or sells any book, paper, document or written or printed matter in any form containing or advocating, advising or teaching the doctrine that the Government of the United States or of any state or of any political subdivision thereof should be overthrown by force, violence or any unlawful means, and who advocates, advises, teaches or embraces the duty, necessity or propriety of adopting the doctrine contained therein;" (New York Civil Service Law, Section 105, 1 (b))

and also by the fact that the range of prohibited behavior to academic personnel is further expanded where it is a felony and punishable by imprisonment for not more than ten years or by a fine of not more than $5,000.00 or both to anyone who:

> "Prints, publishes, edits, issues or knowingly circulates, sells, distributes or publicly displays any book, paper, document, or written or printed matter in any form, containing or advocating, advising or teaching the doctrine that organized government should be overthrown by force, violence or any unlawful means;" (New York Penal Law, Section 161 (2))

And also by the fact that one is disqualified from public employment who:

> "Openly, willfully and deliberately justifies by word of mouth or writing the assassination or unlawful killing or assaulting of any executive or other officer of the United States or of any State or of any civilized nation having an organized government because of his official character, or any other crime, with intent to teach, spread or advocate the propriety of the doctrines of

> criminal anarchy;" (New York Penal Law, Section 161 (3))

or who

> "By word of mouth or writing willfully and deliberately advocates, advises or teaches the doctrine that the Government of the United States or of any State or of any political subdivision thereof should be overthrown or overturned by force, violence or any unlawful means;" (New York Civil Service Law, Section 105 1 (a))

From the examples given above, it will be seen that the statutes indeed go far beyond the mere advocacy of violent overthrow of the Government and as suggested in *Cramp v. Board of Public Instruction,* 368 U. S. 278 at p. 286, and in *Baggett v. Bullitt,* 377 U. S. 360 at p. 370, language less susceptible of objective understanding than this should be scruitinized closely.

There can be little doubt that where statutes of such all encompassing breadth as these are made part of the terms of a scholar's contract of employment at a State university and where such employment is conditioned upon acceptance of such terms that the "ardor and fearlessness of scholars", *Sweezy v. New Hampshire,* 354 U. S. 234 at p. 262 will certainly be checked. In the light of these statutes, it is well to remember that "we need not pause to consider whether an abstract right to public employment exists. It is sufficient to say that constitutional protection does extend to the public servant whose exclusion pursuant to a statute is patently arbitrary or discriminatory. *Weiman v. Updegraff,* 344 U. S. 183 at p. 192.

Compared to the language of this statutory complex, the provisions involved in *Cramp* and *Baggitt* were stark and rigid both in outline and detail. Yet, it is the language of this complex which the State of New York has declared to

constitute the employment terms of the academic personnel involved in this case. For a violation of any of these proscriptions, the party involved would be ineligible for continued employment and possibly criminally prosecuted.

It is no argument to state, as the defendants suggest in their motions to dismiss, that the statutes can be saved because an element of scienter could be read into them. In *Weiman v. Updegraff,* 344 U. S. 183, this court reviewed its decisions in *Adler v. Board of Education,* 342 U. S. 485; *Garner v. Board of Public Works,* 341 U. S. 716 and *Gerende v. Board of Supervisors,* 341 U. S. 56, concluding that a State loyalty statute would be upheld in any case where a requirement of scienter was made explicit in the statute. See *Morris, Baggitt vs. Bullitt:* Scienter and "Guiltless knowing behavior", 1 law in Trans. Q. 185, 208 (1964). Presently, however, scienter, without more would not uphold a loosely worded academic loyalty statute and most certainly for our purposes a loosely worded statute imposed as employment conditions on university professors. Recognizing at once the need to preserve academic freedom, and the fact that permissible academic inquiry is deterred by a vague and indefinite statute regardless of how knowing the actors behavior may be, this court has recently ruled that a state loyalty statute, with or without scienter, is unconstitutional if its effect is to deter free inquiry. See *Baggett vs. Bullitt, Supra; Cramp vs. Board of Public Instruction, Supra.* As was said in *Baggett, Supra,* at p. 368:

> "The susceptibility of the statutory language to require for swearing of an undefined variety of 'guiltless knowing behavior' is what the court condemned in *Cramp.* This statute, like the one * * * in *Cramp,* is unconstitutionally vague."

It is plain that the rule against vagueness has special force where the uncertainty pertains to the right of politi-

cal expression. This is true because uncertainty in this area operates as a prior restraint upon communications, the most noxious form.

The defendants claim in their motion to dismiss that a State employee may teach Communist theory, may write in defense of Communism, or may edit Communist literature among other things. The language of the statutory scheme in this case does not sustain their contention, and university professors are certainly justified in their fears that a chance remark included but not defined in the complex could have disasterous consequences on their careers. This is so especially in light of the fact that recently in another context a case was carried to the Court of Appeals of the State of New York with the sole view towards preventing a known member of the Communist Party merely from presenting a public address at the university. See *Egan vs. Moore,* 14 N. Y. 2d 775, 199 N. E. 2d 842.

Appellants cannot be expected to consent that the statutes and administrative rules involved in this case are part of their contract terms based on the expectation that the courts will ultimately justify any statements they may make. Such piecemeal adjudication "* * * affords safeguards too tenuous to neutralize the danger." *American Communicators v. Douds,* 339 U. S. 382 at p. 420 (Frankfurter, J., dissenting as to vagueness). Furthermore, piecemeal adjudication would delay "* * * ultimate adjudication on the merits for an undue length of time * * * a result quite costly where the vagueness of a state's statute may inhibit the exercise of First Amendment Freedoms." *Baggett v. Bullitt, Supra,* at pp. 378, 379.

The *Egan* case *Supra* indicates the truth of the statement that it is not enough to say that criminal or other sanctions may be remote. "What matters is the existence

of the weapon. Once the sword is placed in the hands of the people in power, then whatever it says, they will be able to reach and slash at almost any unpopular person who is speaking or writing anything they consider objectionable criticism of their policies." (Chaffee, Z. "Freedom of Speech", at p. 466 (1941).)

The court should note that linked with these statutes is a means of enforcement spelled out in the "Regents Rules on Subversive Activities" which provides for a systematic and continuous surveillance in which the public authorities are admonished to watch for a violation of "any of these provisions". The inhibitory effect of such a scheme with watchful eyes overlooking it is readily apparent.

Point II

Defendants also, in their motions to dismiss, defend the presumptions which the State has created from membership in certain groups upon the strength of this court's holding in the case of *Adler vs. Board of Education,* 342 U. S. 485.

It has been pointed out that in 1953 certain findings were made that the Communist Party of the United States and the Communist Party of the State of New York advocated the violent overthrow of the Government of the United States. Appellants emphasize that these findings were made thirteen years ago. Yet, the presumptions from membership still remain. No account is taken of the fact that in the ensuing years, the goals and ends of the organizations listed may have changed; yet on the strength of remote findings a burden is placed on an unfortunate individual who is found to be a member of these groups. Thus, the State need not at any disciplinary hearing prove that the organizations listed presently advocate the violent over-

throw of the Government. The State need only show that the individual involved is a knowing member of the group. It cannot be assumed that the listed organizations continue to advocate violent overthrow thirteen years after they were listed. However, even if such an assumption were valid, appellants maintain that such a fact in itself would not be enough to raise a presumption that all members of the organizations so advocate. The Communist Party has many ends and goals and it cannot be assumed that an individual member has the most offensive characteristic of the organization. The fact of the matter is that the statutes and the constructions placed upon the statutes by the courts of the State of New York fail to take account of the fact that there can be such a thing as innocent knowing membership.

In defense of this system, the State has declared that the presumptions are rebuttable and that the employee involved can rebut the presumptions with substantial evidence. The State's position, thus, is an admission that the statutes assume the guilt of the individual involved and require him to come forward and prove that in fact his knowing membership is innocent. This fact in itself indicates that the complex unconstitutionally shifts the burden of proof. See *Speiser v. Randall,* 357 U. S. 513. Aside from the fact, however, appellants ask this court to reflect upon the difficulties of proving the negative. How does a university professor establish that he does not advocate the violent overthrow of the Government? This is his real burden, since his advocacy of violent overthrow is presumed from membership. While matters of proof are generally left to the State courts, counsel submit that this court can certainly consider such problems within the entire context of this law suit. These statutes like those involved in *Cummings v. Missouri,* 71 U. S. (4 Wall) 277, assume the guilt

of the individual and assess the punishment conditionally. Thus, the statutory scheme raises an issue of fundamental significance.

A university professor may have joined the group to study it. Indeed, he might even agree with some of its aims while disavowing others. He might take part in those activities which he deems to have social importance while not taking part in any other activity repugnant to his principles. He may have joined and was working in the group in order to reorientate its goals and methods. However, the presumptions apply to such individuals as well as to those who actually advocate violent overthrow. Thus, innocent knowing members and guilty members are penalized in the same manner.

The absurdity of such a situation can be found in examples of every day life. All Republicans did not subscribe to the Party's platform in 1964. All Democrats are not social welfare enthusiasts. Neither do all members of an ethnic group share the features of those who would caricature them.

In *Schneiderman v. United States,* 320 U. S. 118, this court stated at p. 136:

> "* * * under our traditions, beliefs are personal and not a matter of mere association, and * * * men in adhering to a political party or other organization, notoriously do not subscribe unqualifiedly to all its platforms or asserted principles."

In *United States v. Brown,* 381 U. S. 437, this court, in discussing this principle, declared at p. 456:

> "Just last term, in *Aptheker v. Secretary of State,* 378 U. S. 500, we held § 6 of the Subversive Activities Control Act to violate the constitution because it "too broadly and indiscriminately' restricted constitutionally protected freedoms. One of the factors which compelled us to reach this conclusion was that § 6 inflicted

its deprivation upon all members of Communist organizations without regard to whether there existed any demonstrable relationship between the characteristics of the person involved and ther evil Congress sought to eliminate, i.d., at 509-511."

Appellants ask this court to forge the sane and sensible rule that in any dismissal proceeding, the State must prove that the individual involved personally has the characteristics which are deemed to be offensive, rather than assuming them initially from membership. It appears that this court has moved towards that end in the recent cases of *Aptheker v. Secretary of State,* 378 U. S. 500, and *Elfbrandt v. Russell,* 34 U. S. L. week 4347.

Adler v. Board of Education, Supra, should be overruled to the extent that it is inconsistent with what has been stated above. To overrule *Adler* in this respect will at last eliminate the doctrine of guilt by association which as a legal thesis, represents an aberration on the American scene.

The presumptions which the State has created will, of course, deter academic personnel and others at the State University of New York from associating themselves with any of the groups in question. This is so in view of the harsh economic consequences which would in fact accrue to an individual who is found to be a member of the proscribed groups and who was unable to surmount the difficulty of proving his loyalty to the United States. It can be observed that perhaps our greatest knowledge of the Communist Party has come from those who at one time or another were members of the organization. These statutes will inhibit those of our society from joining the organization who are in the best position to study it, namely, academic personnel. Indeed, if in fact, the organizations do presently advocate the violent overthrow of the govern-

ment, there are serious implications resulting from a policy which deters those from becoming members who would, in fact, wish to change the organizations' ends and goals and reorientate it in its methods. The deterance of this type of innocent knowing membership in the manner effected by these statutes is a matter of profound significance.

Conclusion

For the reasons stated above and in Appellants' original statement, probable jurisdiction should be noted.

Respectfully submitted,

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BRIEF FOR THE APPELLANTS

IN THE

Supreme Court of the United States

October Term, 1966

No. 105

HARRY KEYISHIAN, GEORGE HOCHFIELD, NEWTON GARVER, RALPH N. MAUD and GEORGE E. STARBUCK,

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Appellees.

ON DIRECT APPEAL FROM THE FINAL JUDGMENT OF A THREE JUDGE UNITED STATES DISTRICT COURT SITTING IN THE WESTERN DISTRICT OF NEW YORK.

BRIEF FOR APPELLANTS

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Appellees.

ON DIRECT APPEAL FROM THE FINAL JUDGMENT OF A THREE JUDGE UNITED STATES DISTRICT COURT SITTING IN THE WESTERN DISTRICT OF NEW YORK

Opinions Below

The unanimous opinion of the three man United States District Court sitting in the Western District of New York was rendered on January 5, 1966 and is set out in the record at pages 278-299. The opinion of the District Court sitting alone and holding that no substantial federal question was raised in this case is reported in 233 F. Supp. 752 (W. D. N. Y. 1964). The decision of the Circuit Court of Appeals reversing and holding a substantial question is presented, is reported in 345 F. 2d 236 (2nd Cir. 1965).

Jurisdiction

This class action was instituted on July 8, 1964 under Section 1 of the Fourteenth Amendment to the Constitution of the United States, as that Amendment exists independently of the First Amendment and as that Amendment incorporates the First and Fifth Amendments; further, under Article 1, Section 10, Clause 1 and Article 6, Clause 2 of the Constitution of the United States, and further, under Section 1343 of Title 28 and Section 1983 of Title 42 and Sections 2281 and 2284 of Title 28 of the United States Code, to pass on the constitutionality of Sections 3021 and 3022 of the New York State Education Law, Section 105 of the New York Civil Service Law, Section 244, Article XVIII of the Rules of the Board of Regents of the State of New York, and the certificates required thereunder to enjoin the appellees, each of whom is either an official body or officer of the State of New York, from enforcing the rules and statutes complained of.

By decision filed on January 5, 1966, the District Court gave judgment for the appellees and denied all relief requested by appellants. Notice of appeal was filed in the District Court for the Western District of New York on

February 14, 1966. On April 16, 1966, the Jurisdictional Statement was filed in this Court and on June 20, 1966 this Court noted probable jurisdiction (record, p. 304).

Jurisdiction of the Supreme Court of the United States to review this decision by direct appeal is conferred by Title 28, United States Code, Section 1253. The following decisions sustain the jurisdiction of this Court to review the judgment in this case on direct appeal: *Baggett v. Bullitt*, 377 U. S. 360; *Shelton v. Tucker*, 364 U. S. 479; *Florida Lime and Avacodo Growers, Inc., v. Jacobsen*, 362 U. S. 73. And see, *Sweezy v. New Hampshire*, 354 U. S. 234; *Speiser v. Randall*, 357 U. S. 513 and *Cramp v. Florida*, 368 U. S. 278.

Statutes, Administrative Rules and Certificates Involved

The provisions of law involved in this case are: Section 105 of the New York State Civil Service Law, Sections 3021 and 3022 of the New York State Education Law, Section 244 of Article XVIII of the Rules of the Board of Regents of the State of New York, Sections 160 and 161 of the New York State Penal Law, and Feinberg Certificates, Forms A and B. Because of their length, the texts of these provisions and the certificates involved are set out in Appendices A through F to this Brief.

Questions Presented

1. Whether the New York statutory complex, together with the administrative regulations, rules and certificates unconstitutionally condition public employment of teachers and scholars at the university level in contravention of First Amendment Freedoms.

2. Whether the New York statutory complex involved, together with the administrative rules, regulations, pro-

cedures and certificates, unconstitutionally deprive appellants of due process of law.

3. Whether the New York statutory complex involved, together with the administrative rules, procedures and certificates, constitute a bill of attainder.

4. Whether the statutory complex involved, together with the rules, procedures and regulations and certificates, constitute an *ex post facto* enactment.

5. Whether the complex involved herein is invalid insofar as it deals with matters preempted by existing federal legislation.

6. Whether the doctrine of abstention is applicable to this case.

Statement

This suit challenges the constitutionality of Section 105 of the New York State Civil Service Law and the statutes incorporated by reference therein, Sections 3021 and 3022 of the New York Education Law, Section 244 of Article XVIII of the Rules of the Board of Regents of the State of New York (hereinafter referred to as the "Regents Rules"), and the certificates and procedures used under the various statutes and rules.

On March 31, 1949, the governor of the State of New York approved Chapter 360, Laws, 1949, being "an act to amend the Education Law in relation to eliminating from the public schools superintendents, teachers and employees who are members of subversive organizations", popularly known as the Feinberg Law. The law added a new section to the Education Law (Section 3022), the first subdivision of which directs the Board of Regents to adopt and enforce rules and regulations for the elimination of

persons barred from employment in the public school systems of the State on any of the grounds set forth in former Section 12-A of the Civil Service Law (now Section 105, as amended) and Section 3021 of the Education Law. The second subdivision of the section further provides that the Board of Regents shall, after inquiry, make a listing of organizations which it finds to be subversive on the various grounds set out in former Section 12-A (now Section 105, as amended) of the Civil Service Law and to provide that membership in such organizations is *prima facie* evidence of disqualification for employment or retention in any office or position in the public schools of the State.

On July 15th, 1949, Article XVIII, Section 244 of the Rules of the Board of Regents, entitled "Subversive Activities", was adopted by the Board of Regents in pursuance to the provisions of the Feinberg Law. These Rules provide, in effect, that the school authorities shall put into operation certain procedures for the disqualification and removal of employees who violate Section 3021 of the Education Law or former Section 12-A (now Section 105, as amended) of the Civil Service Law. In essence, the Rules provide that prior to appointment of any employee, the nominating official shall inquire of his former employers and others whether he is known to have violated the statutory provisions involved, and no person found to have violated the said statutory provisions shall be eligible for employment. Each year the school authorities shall prepare a report on each employee, stating whether there is any evidence, indicating that the employee has violated the statutes involved and any evidence of membership in an organization listed as subversive by the Board of Regents. If there is found to be such evidence, the reporting official shall recommend the employee's dismissal and within ninety days thereafter, the school authorities must either prefer

formal charges or reject the recommendation. In cases where the school authorities find that in their judgment the evidence indicates a violation of the statutory provisions, they shall immediately commence dismissal proceedings.

Shortly after the passage of the Feinberg Law, and the adoption of the Regents Rules, three cases were brought in the State Courts challenging their validity. (*Thompson v. Wallin,* 276 App. Div. 463; *L'Hommedieu, et al. v. Board of Regents, et al.,* 276 App. Div. 497; and *Lederman, et al. v. Board of Education,* which was subsequently to be known as *Adler v. Board of Education,* 276 App. Div. 527. Ultimately, these cases reached the New York Court of Appeals, which sustained the constitutionality of the challenged law and rules in a single opinion covering all three cases, *Adler v. Board of Education,* 301 N. Y. 476. Thus the Court gave judicial sanction to a procedure by which the Board of Regents could promulgate lists of allegedly subversive organizations and on the basis of such lists declare those employed in the educational system of New York to be *prima facie* disqualified from *all public employment* solely because of their membership in proscribed organizations. The holding was affirmed by the United States Supreme Court in *Adler v. Board of Education,* 342 U. S. 485 (1952).

Subsequent to the Supreme Court decision in *Adler,* and in 1953, by virtue of an extremely significant amendment to Section 3022 of the Education Law (New York Laws, 1953, Ch. 681), the applicability of the entire complex of laws was expanded to include not only the public schools, but institutions of higher learning as well, thus extending its cover to thousands of employees and educators in the State University system. In retrospect, it can be observed that this amendment set the stage for the present suit. In September, 1953, pursuant to New York Education Law,

Section 3022, the Regents listed the Communist Party of the State of New York and the Communist Party of the United States as proscribed organizations, and on May 10, 1956, an *Ad Hoc* Committee of the Board of Trustees of the State University of New York established the so-called Feinberg Certificate (see Appendix E, for original and modified version). Both certificates provide:

> "Anyone who is a member of the Communist Party or of any organization that advocates the violent overthrow of the Government of the United States or of the State of New York, or any political subdivision thereof, cannot be employed by the State University."

The certificates further declare that the subscriber has read the Regents Rules, that the Regents Rules and the statutes cited therein constitute the terms of his employment, and that he is not now a member of the Communist Party, and if he had ever been a member, he has communicated that fact to the president of the University. These certificates were apparently circulated throughout the State University system and refusal to subscribe to the certificate was made a ground for dismissal on grounds of insubordination. With respect to the certificate, it should be emphasized that it is a duality. In effect, it makes inquiry into past and present associations, but even more importantly, it requires an employee, or prospective employee to consent that certain offensive statutes shall form a part of his contract of employment. This aspect of the case will be further elaborated upon in the argument below.

In 1958, Section 12-A of the Civil Service Law was amended and renumbered Section 105 (New York Laws, 1958, Ch. 790). The amendment (Civil Service Law, Section 105(3)), is captioned "Removal for Treasonable and Seditious Acts or Utterances", and provides:

> "A person in the civil service of the state or of any civil division thereof shall be removable therefrom for the utterance of any treasonable or seditious word or words or the doing of any treasonable or seditious act or acts while holding such position. For the purpose of this subdivision, a treasonable word or act shall mean 'treason', as defined in the Penal Law; a seditious word or act shall mean 'criminal anarchy' as defined in the Penal Law."

This amendment, with its references to the Penal Law, raises a question as to the affect of Sections 160 and 161 of the New York Penal Law on all the provisions here involved. Further, in 1958, a new section was added to Section 12-A(c) (New York Laws, 1958, Ch. 503), which provides:

> "For the purposes of this section, membership in the Communist Party of the United States of America or the Communist Party of the State of New York, shall constitute *prima facie* evidence of disqualification for appointment to or retention in any office or position in the service of the state or of any city or civil division thereof."

This section naming the Communist Party of the United States and the Communist Party of the State of New York as proscribed organizations, brings into focus the question as to whether the complex here involved is a bill of attainder.

Prior to 1962, the University of Buffalo was a private institution. However, as of September 1st, 1962, the University of Buffalo was merged into the State University system of the State of New York (Record p. 19). Sometime thereafter, all members of the academic staff of the State University of New York at Buffalo were required to sign the certificate known as the Trustees Certificate, previously alluded to as a condition of their continued employment.

It can be observed that the State University of New York employs approximately 17,000 persons (of whom approximately 15,000 are full time), and that all of these employees are subject to the procedures of the State University of New York for the administration of Section 3022 of the New York State Education Law (Record p. 18). Approximately 1,000 full time and 800 part time persons are employed by the State University of New York at Buffalo, in the unclassified service (those whose principal functions are teaching or the supervision of teaching). Of the persons employed by the State University of New York in the unclassified service at the time of the commencement of this action, the appellants, other than Starbuck, are the only persons who had refused to sign either of the certificates in connection with the continuation of their employment with the State University of New York. This is so despite the fact that many other persons in the same class as the aforementioned four appellants had objected to the requirement to sign either of the said certificates (Record p. 18). The repugnance for the certificates and procedures involved with respect to the Feinberg Law is strikingly apparent in the fact that at a meeting of between 300 and 400 members of the American Association of University Professors at the State University of New York at Buffalo Chapter, certain resolutions protesting the certificates, procedures and laws were adopted (Record pp. 27-29). At the time this action was commenced, however, only appellants Keyishian, Hochfield, Garver and Maud had not yet signed the certificates in question. Thus, the State of New York, by threatening its educators with dismissal from employment was effectively able to coerce hundreds of its educators into consenting that certain statutes which they found offensive should form a part of their employement and contract terms. It seems clear that the threat of loss of em-

ployment provides a weapon uniquely suited to mute protest and bring about doctrinal conformity.

As previously indicated, appellants Keyishian (formerly an Instructor in English), Hochfield (Associate Professor of English), Garver (Lecturer in Philosophy), and Maud (formerly Assistant Professor in English) all under differing term appointments to the academic staff at the State University of New York at Buffalo, declined to sign the Trustees Certificate. These appellants were subsequently notified that due to their failure to sign, dismissal proceedings were being undertaken against them on the grounds of insubordination (Record pp. 263-273). Appellants were further notified that their terms would not be renewed if they did not sign the certificates as requested. The term of appellant Keyishian has ended and his appointment has not been renewed. The terms of Hochfield and Garver have not expired and they remain in their former positions. They have been informed that dismissal proceedings will be held in abeyance pending a determination of the validity of the statutes, rules and procedures here involved. Maud accepted a position after his term expired in September 1965, again subject to the determination of the present suit, but has resigned from the University. Appellant Starbuck was appointed by the State University of New York at Buffalo on September 1st, 1963, under a one-year contract as a Specialist in Acquisitions, and, in addition, in January 1964 was appointed as a Lecturer in English. Subsequent to the former appointment, Mr. Starbuck was required to subscribe and answer under oath to the following question:

> "Have you ever advised or taught or were you ever a member of any society or group of persons which taught or advocated the doctrine that the Government of the United States or of any political subdivisions

thereof should be overthrown or overturned by force, violence, or any unlawful means?"

The question, in written form, was one of several put to Starbuck by means of a New York State Civil Service form (Pr-75) and was styled question "7" (Record p. 212). The question requires a written "Yes" or "No" answer and appellant Starbuck could be prosecuted for perjury for falsely answering it.

Starbuck was apparently not required to execute the Trustees certificate for the reason that he was considered to be a temporary employee in the classified service of the State of New York, which is one of the two major divisions of the New York Civil Service. The other division (unclassified service) consists of those whose "principal functions are teaching or the supervision of teaching". It is clear, however, that Starbuck is covered under all the provisions of this complex including Education Law Sections 3021 and 3022 and the Rules of the Board of Regents.

Appellant Starbuck declined to answer the question and as a result was dismissed from his appointment on June 18, 1964.

In view of the actual and threatened dismissals and actions of those bound to enforce this complex, there can be no claim that this lawsuit deals with provisions in the abstract. The appellants are "threatened with action under the law", *Adler v. Board of Education*, 342 U. S. 485 at 504 (Frankfurter, J., dissenting) and "Steps are imminent whereby they would incur the hazard of punishment for conduct innocent at the time, or under standards too vague to satisfy due process of law", *Adler, supra*, at 504 (Frankfurter, J., dissenting). Indeed, all the appellants involved in this case have already been injured by reason of certain actions taken against them by those charged with adminis-

tering the statutes and rules with which we are here concerned. For example, prior to November 4, 1964, promotions or salary adjustments recommended by the State University of New York at Buffalo would not be made or recommended by the administrative officers of the State University of New York in the case of employees who had failed to sign the Trustees Certificate. For this reason, a discretionary salary adjustment of $326.00 annually was not given to appellant Hochfield, effective September 3, 1964. Such adjustment was later made effective December 26, 1964 (Record p. 26). A course of instruction to be taught by appellant Garver in the night school at the State University of New York at Buffalo for the first semester of 1964, commencing in September 1964, was cancelled because of his failure to sign the certificate and consent that the rules and laws were part of his contract terms (Record p. 26). Appellant Maud was not recommended for promotion to Associate Professor, III, effective September 3, 1964, because of his failure to sign the certificate. However, he was promoted to this position effective January 1965. Further, Appellant Maud was not appointed to teach a class in the night school at the State University of New York for the fall semester commencing 1964 because of such failure on his part (Record p. 26).

Additionally, this Court is presented in this case with a striking, and perhaps, even a frightening example of the coercive force generated by the use of a threat of dismissal from employment. A really significant factor involved here is that many other persons in the same class as the aforementioned four appellants had objected to the requirement that they sign the certificates and the requirement that they consent that the statutes and rules involved should form a part of their employment terms.

The fact that so many were opposed to the certificate and laws and so few refused to sign indicates that the State, by theatening its educators with dismissal from employment, has utilized a weapon of uncommon effectiveness. The fact that the educational elite of a great university can be coerced into giving up their First Amendment rights in such a manner certainly indicates the truth of the statement that these rights are "fragile and delicate" and capable of being suppressed without too much difficulty, at least where dismissal from employment is the weapon used. Thus, unlike the *Adler* case, this Court is presented with the very real problem of the application of this complex.

On July 8th, 1964, appellants commenced the present class action in the United States District Court for the Western District of New York, seeking an injunction against the enforcement of the statutes involved in this case and of the regulations and procedures used to implement these statutes. The District Court held that no substantial federal question was raised, and accordingly, refused to refer the case to a three judge district court, 233 F. Supp. 752 (W. D. N. Y., 1964). An appeal was taken to the United States Court of Appeals for the Second Circuit which Court reversed and directed that the case be heard before a three judge court, 345 F. 2d 236 (2d Cir., 1965). The Court noted that Civil Service Law, Section 105(3) had been added after the *Adler* decision and observed that there was a significant similarity between the laws in question here and those held unconstitutional in *Baggett v. Bullitt,* 377 U. S. 360.

Judge Marshall, in speaking of the *Adler* opinion, also stated that it had held Section 3022 constitutional as applied to teachers in the public schools but that the Supreme Court had not considered the application of Section 3022

to university faculty, and had refused to pass upon the constitutionality of Section 3021. The Court of Appeals decisively rejected the notion put forth by the appellees that public employment may be conditioned upon the surrender of First Amendment freedoms with these words:

> "* * * the theory that public employment which may be denied altogether may be subjected to any conditions, regardless of how unreasonable, has been uniformly rejected." *Keyishian v. Board of Regents,* 345 Fed. 2d 236 at 239.)

It called attention to the statement in *Weiman v. Updegraff,* 344 U. S. 183, 192, that public employment may not be denied on "patently arbitrary or unreasonable" grounds.

On June 10, 1965, one week before the argument to the three judge court, the Board of Trustees of the State University of New York unanimously adopted certain resolutions (Appendix F) which in effect declared that it would no longer be the policy of the State University of New York to require as a condition for employment the execution of the certificates of the type previously referred to. "New" procedures for appointments were instituted. These procedures provide essentially that Section 105 of the New York Civil Service Law and Sections 3021 and 3022 of the New York Education Law and the Rules of the Board of Regents still constitute the terms and conditions for employment and retention in employment of any teacher or scholar. (The full panoply of the statutes, rules and procedures are set out in Appendices A-F). Furthermore, the resolution provides that anyone employed prior to the effective date of the resolution shall not be deemed ineligible for employment "solely" by reason of his failure to sign the certificates involved. Thus, in addition to providing that certain offensive statutes are still part of the professors' contract terms, the resolution maintains the constitutional issues raised by the certificates as well.

On June 16, 1965, a three judge district court, sitting in the Western District of New York, heard arguments on the merits in this case, and on January 5, 1966, the same court rendered a decision and order denying all the relief requested by the appellants (Record p. 300). Thereafter, and on February 14, 1966, the appellants filed in the Federal District Court for the Western District of New York a notice of appeal to this Court. On April 16, 1966, appellants filed their statement as to jurisdiction, and on June 20, 1966, this Court noted probable jurisdiction (Record p. 304), thus bringing this case to its present posture.

Summary of Argument

Appellants, university professors and personnel, and others similarly situated in the State University of New York have been required to consent that certain statutes, administrative rules and procedures shall form a part of their contract terms. A failure to so consent results in dismissal from employment.

I

The statutes in question are unconstitutional and void both on their face and as they have been construed and applied to appellants and to all others similarly situated. They proscribe and infringe upon rights of speech and association which are protected by the First and Fourteenth Amendments to the United States Constitution.

Sections 3021 and 3022 of the Education Law and Section 105 of the Civil Service Law are invalid on their face due to language which is unduly vague, uncertain and broad. Specifically, appellants maintain that the requirement that they refrain from "* * * the utterance of any

treasonable or seditious word * * *", or from "* * * the doing of any treasonable or seditious act * * *" is a proscription so uncertain of objective measurement or ascertainment as to fall far short of the requirements of due process. Appellants maintain further that the words "criminal anarchy" as they stand alone and as defined in Sections 160 and 161 of the Penal Law and as construed are unconstitutionally vague. Further, the statutes eliminate from academic employment any person who "* * * advises or teaches the doctrine that the Government of the United States * * * or of any political subdivision thereof should be overthrown or overturned by * * * any unlawful means; or prints, publishes, edits, issues or sells any * * * written or printed matter in any form containing or * * * advising * * * the doctrine that the Government of the United States or of * * * any political subdivision thereof should be overthrown by * * * any unlawful means, and who * * * embraces the * * * propriety of adopting the doctrine contained therein; or * * * becomes a member of any * * * group of persons which teaches or advocates that the Government of the United States or of * * * any political subdivision thereof shall be overthrown by * * * any unlawful means." Appellants maintain that the statutory language quoted above enjoins conduct in terms so patently vague that men of common intelligence must necessarily guess at its meaning and differ as to its application and which language consequently is violative of appellants' rights of due process. Appellants maintain further, regardless of the vagueness of the language itself, that the prolixity and profusion of the language and the manifold references in the statutes, rules and certificates herein complained of to interrelated provisions, and the uncertainty as to the identity, effect, or pertinence of certain of said provisions results in a vague and uncertain understanding of

what behavior is proscribed and therefore, of itself, constitutes a denial of due process.

Appellants and all other similarly situated are prohibited from engaging in constitutionally protected speech and association and further incur substantial risk of unfair prosecution for deviations from a vague and unconstitutionally broad standard. Moreover, all appellants herein are enjoined from conduct clearly protected by the First and Fourteenth Amendments and are especially deterred from engaging in such lawful conduct by the continual investigative and inquisitorial procedures required by the Rules of the Board of Regents. The requirement of said rules that one's superiors report on observed deviations from standards so vague and overly broad as those presently complained of is especially repugnant to the First Amendment inasmuch as it operates inevitably to deter free speech and to discourage controversial and socially desirable discussion and association. Further, such proscriptions are not justified by a subordinating regulatory interest which is compelling. The statutes, rules and procedures, certificates, and oaths herein complained of infringe plaintiffs' constitutionally protected rights in the absence of any substantial danger from which the State must necessarily protect itself by resort to such measures, and by reason of the fact that they impose a broader standard of disqualification than can be utilized where the conduct proscribed would be punishable by criminal penalties.

II

The statutes and rules, certificates and questionnaires complained of by use of invalid statutory presumptions shift the burden of persuasion and proof to appellants. By their very presence these presumptions inhibit and

deter appellants and others similarly situated from becoming members of proscribed organizations and thus, interfere with and deter innocent knowing membership in said groups violating in process appellants' freedom of association and academic freedom.

The complex further forces appellants to choose between possible self-incrimination or public employment and thus, constitutes a violation of due process of law.

The failure to accord a hearing to persons refusing to consent that the complex forms a part of their contract terms, upon denial of an initial appointment or renewal of appointments, and the failure to accord a hearing to persons under dismissal proceedings wherein such persons can explain and have considered their grievances and objections relative to such consent constitutes a denial of procedural due process. In effect, a refusal to consent produces inferences of disloyalty and guilt and, moreover a conclusion of unfitness for employment, which conclusion is arbitrary and discriminatory. Such automatic and summary procedures are unreasonable and lacking in the degree of fairness required by due process since persons refusing to consent are afforded no opportunity to have conscientious objections for their refusal considered, which objections may be based on a *bona fide* belief that the statutes, administrative rules and regulations unlawfully proscribe constitutionally protected speech, or upon an uncertainty of what conduct is proscribed due to the vagueness, prolixity and profusion of the statutes and rules referred to.

III

The complex is a Bill of Attainder. By use of certain statutory presumptions it assumes the guilt and nonem-

ployability of members of certain proscribed organizations while at the same time casting upon those members the burden of refuting the inferences drawn. Thus, the complex assumes the guilt and assess the punishment conditionally, a form of Bill of Attainder similar to that declared unconstitutional in *Cummings v. Missouri*, 71 U. S. 277.

IV

The complex is an *ex post facto* enactment. It mandates that past membership in certain proscribed groups shall be presumed to have continued unless termination of such membership in good faith can be shown. Failure to show such good faith termination results in a dismissal from public employment on the grounds of "subversion". By imposing the punishment of dismissal from employment for past activities in this manner the complex punishes innocent past acts and is therefore, unconstitutional.

V

The complex proscribes activity and imposes disabilities for conduct directed against the United States and thus, is invalid insofar as it deals with matters preempted by existing federal legislation.

ARGUMENT

I

The statutory complex involved, together with the administrative regulations and threats of sanctions and punishments form a unique system which unconstitutionally condition public employment of teachers and scholars at the university level in contravention of First Amendment freedoms made applicable to State action under the Fourteenth Amendment.

A. Prior decisions of the Supreme Court are not opposed to the claims raised by the appellants in this case.

The controlling effect of prior Supreme Court holdings must necessarily be minimized in this suit for two reasons. First, since the complaint in this case is founded at least in part upon the vagueness of statutes which are both unique and highly complex, of logical necessity the alleged infirmities must be carefully and individually scrutinized, and second, in any case dealing with First Amendment freedoms, especially freedom of speech and association, this Court has stated that an adjudication must go forth carefully on a case by case analysis. "In each case courts must ask whether the gravity of the evil, discounted by its improbability, justifies such invasion of free speech as is necessary to avoid danger." *Dennis v. U. S.*, 341 U. S. 494 at 510.

At the outset, we should direct our attention to the case of *Adler v. Board of Education of the City of New York*, 342 U. S. 485 (1952) for the reason that the Court below relied heavily upon it. *Adler* does not dispose of the issues in this case. The complaint in *Adler* was directed only at Section 3022 of the Education Law and 12-A of the Civil

Service Law. Although the appellants in *Adler* argued before the Supreme Court that Section 3021 was unconstitutionally vague, the court abstained from ruling upon the question since the issue had not been raised below. See *Adler, supra,* at page 496. In fact, the attack upon the statutes in *Adler* on the grounds of vagueness was limited to the single word "subversive" as it appears in Section 3022 of the Education Law. See *Adler, supra,* at page 496. The present complaint is more broadly framed; plaintiffs challenge the statutory scheme as a whole, charging that its complexities are so profound and so pervasive as to render the entire network unconstitutionally vague. Counsel particularly direct the Court's attention to the fact that the present complaint attacks the vagueness of the proscriptions set out in Section 105(1)(a), (b), and the first paragraph of (c), as well as the remainder of Section 105 of the Civil Service Law. Emphasis is placed upon this fact for the reason that although the Supreme Court in *Adler* stated that it found no constitutional deficiency in 12-A of the Civil Service Law, an examination of the briefs in the Supreme Court in that case discloses that *the unconstitutionality of that section was not pressed in the Supreme Court; indeed, it was not even argued as both sides conceded the constitutionality of 12-A.* (Appellant's brief, pp. 5-6, 9; appellees' brief, p. 16.) Thus the challenge in the original *Adler* case was directed only at the implementing legislation (Section 3022 and Section 3021 of the Education Law) and not to 12-A on its face.

> "The issue is not whether Communists should be allowed to teach in the public schools, nor even whether persons who advocate the overthrow of the government by force should be allowed so to teach—the old law (Civil Service Law Section 12-A) adequately takes care of such persons. The issue is whether lists should be promulgated of organizations which an administra-

tive agency, without particular competence in that field, has declared advocate the overthrow of the government by force." (Appellants' brief, in original *Adler* case, p. 9).

It is not surprising, therefore, that Section 12-A was so casually passed over by the Supreme Court without analysis or discussion. *Adler*, therefore, does not control on the issue of the constitutionality of the language of former Section 12-A, since sound reason requires that for this question to have been foreclosed by prior adjudication, it would be necessary for this Court to have ruled upon the very language here attacked. *Adler* is further not dispositive of the issues in this case for the reason that subdivision 3 of Section 105 of the Civil Service Law was added by the New York Legislature in 1958 (New York Laws, 1958, Ch. 790). This provision, not having existed at the time *Adler* was decided, of course, has not been foreclosed from consideration by that decision. Moreover, this subdivision, with its references to the Penal Law, raises the question of the effect of Sections 160 and 161 of the New York Penal Law upon all of the provisions here involved. Additionally, in 1958, a new paragraph was added to Section 12-A(c) (N. Y. Laws, 1958, Ch. 503). This paragraph, naming the Communist Parties of the United States and of the State of New York as proscribed organizations was added long after the *Adler* decision.

The Trustees Certificate, having been established by an *Ad Hoc* Committee of the Board of Trustees on May 10, 1956, also was not in existence when *Adler* was decided and the very important constitutional questions which it raises are not foreclosed by that decision.

Additionally, the alleged discontinuance of the Trustees Certificate, one week before the argument before the three man court, and the institution of "new" procedures on new

academic appointments raise a great many questions not before the Court in *Adler*. While these new procedures will be discussed more fully below, the Court's attention should be directed to the fact that the procedures indicate that Section 105 of the Civil Service Law and Sections 3021 and 3022 of the Education Law and the Rules of the Board of Regents with respect thereto, still constitute conditions and terms of retention or appointment to the University. Thus, the discontinuance of the certificates has not affected the issues presented by this suit. Further, it should be observed that while the certificates have been discontinued, the resolution which allegedly discontinued them indicates that they are still to be deemed to have some viability for the reason of the fact that no person shall be deemed ineligible "solely" by reason of his failure to execute the certificate (Appendix, F).

With respect to the original legislation before the court in the *Adler* case, it can clearly be stated that the Feinberg legislation was particularly directed to safeguarding public school children from supposed subversive influences. This can be observed from reading the declaration of policy of the Legislature which prefaced the operative sections of the original legislation (Record, p. 246).

For example, the Legislature, in speaking of the need to prevent the infiltration of subversives into the public schools, declares:

> "The consequence of any such infiltration into the public schools is that subversive propaganda can be disseminated among children of tender years by those who teach them and to whom the children look for guidance, authority and leadership" (Record, p. 246).

The declaration of policy then goes on to state that:

> "The Legislature further finds and declares that in order to protect the children in our state from such

> subversive influence, it is essential that the laws prohibiting persons who are members of subversive groups, such as the Communist Party, and its affiliated organizations, from obtaining or retaining employment in the public schools, be rigorously enforced" (Record, p. 246).

It is clear, therefore, that the *Adler* holding was developed in the context of protection for immature minds from conflicting philosophies and that its rationale did not reach other educational levels. The New York Legislature recognized this feature of the *Adler* decision and by a 1953 Amendment to Section 3022 of the Education Law (N. Y. Laws, 1953, Ch. 681), the applicability of the section (and consequently of 105 of the Civil Service Law which is incorporated by reference therein) was extended to include, not only public schools, but institutions of higher learning as well. This provision was not before the court in *Adler*. Considering that the statutes which this amendment modifies impose serious restrictions upon free inquiry, the impact of this amendment cannot be lightly brushed aside. Our society relies heavily upon its institutions of higher learning as a source of new ideas. The challenge to orthodox political notions, however disconcerting it may be, or however repugnant it may be to the statutes presently in force in New York, is nevertheless valuable to our political selfawareness. By so depriving our professors and their students of free inquiry, we stimulate the kind of smugness presently seen to impose perhaps a graver threat to our institutions than any which has preceded it. See generally, *Morris, Baggett v. Bullitt;* Scienter and "Guiltless Knowing Behavior", 1 Law in Trans. Q. 185, 189 (1964). The public school and the institution of higher learning are designed to function at different levels and to reduce the latter to the level of the former is to destroy entirely its *raison d'etre.*

Another new and pervasive influence upon the statutes complained of arises from the reference in Section 105(3) of the Civil Service Law to the New York Criminal Anarchy Statute (N. Y. Penal Law, Sections 160, 161). It will be seen that in attempting to assign some meaning to the words "seditious utterance or act", the New York Legislature has further circumscribed the permissible conduct of those affected by the statutes and rules complained of. This amendment was added in 1958, long after *Adler* was handed down (see N. Y. Laws, 1958, Ch. 790), and since it affects not only the section in which it appears, but Section 3022 of the Education Law and the Regents Rules as well, these provisions must now be carefully analyzed as to their bearing in the present suit.

Thus, in essence, it is a vastly different statutory scheme which is here attacked than that which was before the court in *Adler*. Furthermore, the parties attacking the statutes have interests which differ considerably from those parties in the original *Adler* proceeding. As to *Adler's* substance, it can be observed that the court adhered to the concept of public employment, academic or otherwise, as a privilege. See *e. g., Bailey v. Richardson,* 182 F. 2d 46 (D. C. Cir. 1950), aff'd., 341 U. S. 918 (1951). It was said in *Adler* that teachers had "* * * no right to work for the state in the school system on their own terms * * *. If they [did] not choose to work on such terms, they [were] at liberty to retain their beliefs and associations and go elsewhere", *Adler, supra,* at page 492. Thus, ultimately, the Court said, no freedoms have been denied a teacher in this way. The Court in *Adler,* therefore, adhered to the proposition that since government employment could be denied altogether, it could be conditioned upon the relinquishment of First Amendment liberties. This Court subsequent to *Adler* has clearly de-

parted from the central anchor of that case. As was stated in the Court of Appeals in *Keyishian v. Board of Regents*, 345 F. 2d 236 (2nd Cir., 1965):

> "* * * The theory that public employment which may be denied altogether may be subjected to any conditions, regardless of how unreasonable, has been uniformly rejected. In less than a year after *Adler* the Supreme Court clearly limited its language in *Adler*:
>
> > 'We need not pause to consider whether an abstract right to public employment exists. It is sufficient to say that constitutional protection does extend to the public servant whose exclusion pursuant to a statute is patently arbitrary or discriminatory. *Weiman v. Updegraff*, 344 U. S. 183, 192 * * * (1952)' " (*Keyishian, supra*, p. 239).

See also *Sherbert v. Verner*, 374 U. S. 398 (1963) ("It is too late in the day to doubt that the liberties of religion and expression may be infringed by the denial of or placing of a condition upon a benefit or privilege" at p. 404). *Weiman v. Updegraff*, 344 U. S. 183 at 192; *Torcaso v. Watkins*, 367 U. S. 488, at 495 through 496; *Cramp v. Florida*, 368 U. S. 278, at 288 and *Slochower v. Board of Education*, 350 U. S. 551, at p. 555.

Additionally, *Adler*, upheld the presumption of disqualification found upon membership in proscribed organizations on the basis of the "generality of experience". The court used the following language at pages 494-495:

> "Membership in a listed organization found to be within the statute and known by the member to be within the statute is a legislative finding that the member by his membership supports the thing that the organization stands for, namely, the overthrow of government, by unlawful means. We cannot say that such a finding is contrary to fact or that 'generality of experience' points to a different conclusion."

Since *Adler*, this Court has shifted its emphasis and has recognized the dangers to liberties inherent in a system

which shifts the burden of proof. In *Speiser v. Randall*, 357 U. S. 513, this Court struck down a California oath, which was required to be executed in order that property owners could qualify for a tax exemption. In that case, this Court, at page 526, declared:

> "The vice of the present procedure is that, where particular speech falls close to the line separating the lawful and the unlawful, the possibility of mistaken fact finding—inherent in all litigation—will create the danger that the legitimate utterance will be penalized. The man who knows that he must bring forth proof and persuade another of the lawfulness of his conduct necessarily must steer far wider of the unlawful zone than if the state must bear these burdens. This is especially to be feared when the complexity of the proofs and the generality of the standards applied, *cf., Dennis v. U. S.* * * * provide but shifting sands on which the litigant must maintain his position. How can a claimant whose declaration is rejected possibly sustain the burden of proving the negative of these complex factual elements? In practical operation, therefore, this procedural device must necessarily produce a result which the state could not command directly. It can only result in a deterrence of speech which the constitution makes free."

The *Speiser* case, decided in the context of an oath, provides a measure of protection against the procedural device (the presumption) utilized in *Adler* and thus represents a weakening of the *Adler* rationale with respect to that presumption. See also *Aptheker v. Secretary of State*, 378 U. S. 500; *Elfbrandt v. Russell*, 34 U. S. L. W. 4347.

The *Adler* decision also fails to take account of the more lately recognized importance of academic freedom, *Sweezy v. New Hampshire*, 354 U. S. 234, and was decided before this Court fully recognized the constitutional right of private association. *N. A. A. C. P. v. Alabama*, 357 U. S. 449. Furthermore, *Adler* relied in part on *Garner v. Los Angeles*

Board, 341 U. S. 716 (1951), for a point which was expressly not considered in *Garner*, and about which the Court stated at page 720, "Not before us is the question whether the city may determine that an employee's disclosure of such political affiliation [in the Communist Party, U. S. A.] justifies his discharge."

In New York, affirmative disclosure of the information being elicited would result in "*prima facie* evidence of disqualification for appointment to or retention in any office or position in the service of the state or any city or civil subdivision thereof." New York Civil Service Law, Section 105, New York Education Law, Section 3022(2).

The reason for this is that past membership in a subversive organization is "presumptive evidence that membership has continued, in the absence of a showing that such membership has been terminated in good faith." Rules of the Board of Regents, Article XVIII, Section 244(2).

Also, the Court's reliance in *Adler* on the *Garner* case is not applicable here for the reason that *Garner* did not consider the interest of a state, nor those of a professor, nor those of society in academic freedom on the university campus. *Garner* does not speak of this set of relationships. That the interests of both a state and an employee in the municipal civil service differ materially and fundamentally from a state's interest in its professorial faculty and a professor's interest in academic freedom cannot be denied. Whatever the interest the state may have in minimally restricting the speech and association of municipal civil servants as a condition of their employment, that interest is, obviously, not of the same order as its interest with respect to the speech and association of faculty members, and this Court has so recognized in *Sweezy, supra*, decided

subsequent to *Adler* and *Garner*. The Court's opinion below indicated that this Court's disposition in *Gerende v. Board of Supervisors*, 341 U. S. 56 has a strong bearing on the issues involved in this case. The *Gerende* case does not dispose of any issues in this case. In *Gerende*, this Court affirmed the judgment of the Maryland Court of Appeals on the grounds that "a candidate need only make oath that he is not a person who is engaged 'in one way or another in the attempt to overthrow the Government by force or violence' * * *". *Gerende, supra* at page 67. This Court did not have before it Section 15 of Maryland's Ober Act, which broadly defines a "subversive person," as the Maryland Court had held that the section did not apply to *Gerende*. *Shub v. Simpson*, 76 A. 2d 332 at 341.

Neither is this case controlled by *Konigsberg v. State Bar*, 353 U. S. 252 (1957) and *In re Anastaplo*, 366 U. S. 82, for the reason that has been stated above that there is a difference between a state offering a "privilege" and the state legislating conditions of state employment. Neither is this case controlled by *Beilan v. Board of Education*, 357 U. S. 399 (1958), for the reason that in the *Beilan* case the individual involved there could have given the required information and still retained his employment. It will be noted that in the State of New York that result is not the case. The system is exclusionary and not designed to secure information only. For similar reasons, *Lerner v. Casey*, 357 U. S. 468 (1958) and *Nelson v. Los Angeles*, 362 U. S. 1, do not control. For the reasons set forth above a mere recitation of citations involving the employee dismissal cases will not answer the issues raised by the case at bar.

More is at stake in this case than the questions merely of inquiry and the scope of inquiry which can be carried

on by a public authority. The statutory scheme in question is not primarily designed to elicit information. It is exclusionary. It is designed to exclude from the public service certain individuals who fall within its proscriptions. It is with statutory employment conditions that we deal with here. It thus becomes necessary to critically analyze these employment terms in an attempt to resolve their reasonableness, especially when viewed with regard to First Amendment freedoms and the interests of those whom society should guard most strongly—its academic personnel.

B. The statutes, administrative regulations and procedures, interfere with, deter, and have an unconstitutionally inhibitory effect on appellants' free exercise of First Amendment freedoms.

This case presents the issue of freedom of speech and association in one of its most significant and sensitive aspects—the area of academic freedom. The importance of unimpeded thought in the right of exploration for teachers unhampered by state harassment far exceeds that of any other profession or vocation. The United States Supreme Court has fully recognized the special importance of this interest.

In *Sweezy v. New Hampshire,* 354 U. S. 234 (1957), four members of the Supreme Court held the view that:

> "The essentiality of freedom in the community of American universities is almost self-evident. No one should under-estimate the vital role in a democracy that is played by those who guide and train our youth. To impose any straight-jacket upon the intellectual leaders in our colleges and universities would imperil the future of our nation. No field of education is so thoroughly comprehended by man that new discoveries cannot yet be made. Particularly is that true in the social sciences, where few if any, principles are accepted

as absolutes. Scholarship cannot flourish in an atmosphere of suspicion and distrust. Teachers and students otherwise our civilization will stagnate and die." (*Sweezy, supra,* at p. 250.)

* * *

"We do not conceive of any circumstances wherein a state interest would justify infringement of rights in these fields." (*Sweezy, supra,* at 251.)

The *Sweezy* case recognizes therefore, the vital importance of academic liberty. The justices were in agreement that,

"* * * petitioner's right to lecture and his right to associate with others were constitutionally protected freedoms which had been abridged through this investigation. These conclusions could not be seriously debated * * *. We believe that there unquestionably was an invasion of petitioner's liberties in the areas of academic freedom and political expression—areas in which government should be extremely reticent to treads." (*Sweezy, supra,* at pp. 249-250.)

Mr. Justice Frankfurter and Mr. Justice Harlan, in a concurring opinion, stated that,

"* * * the dependence of a free society [is] on free universities. This means the exclusion of governmental intervention in the intellectual life of a university. It matters little whether such intervention occurs avowedly or through action that inevitably tends to check the ardor and fearlessness of scholars, qualities at once so fragile and so indispensable for fruitful academic labor." (*Sweezy, supra,* at 262.)

In *Shelton v. Tucker,* 364 U. S. 479, 487, the Court quoting from the concurring opinion of Mr. Justice Frankfurter in *Weiman v. Updegraff,* stated:

"The vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools. 'By limiting the power of the states to inter-

> fere with freedom of speech and freedom of inquiry and freedom of association, the Fourteenth Amendment protects all persons no matter what their calling. But, in view of the nature of the teacher's relation to the effective exercise of the rights which are safeguarded by the Bill of Rights and by the Fourteenth Amendment, inhibition of freedom of thought, and of action upon thought, in the case of teachers brings the safeguards of those amendments vividly into operation. Such unwarranted inhibition upon the free spirit of teachers * * * has an unmistakable tendency to chill that free play of the spirit which all teachers ought especially to cultivate and practice; it makes for caution and timidity in their associations by potential teachers.' *Weiman v. Updegraff*, 344 U. S. 183, 195 concurring opinion."

While it is clear that the Supreme Court is now committed carefully to safeguarding academic freedom, the Court has on the other hand never suggested that a state may not lay down reasonable terms of employment for its teachers and professors. That which constitutes reasonableness in such a case, however, has been re-examined and modified, as the importance of academic freedom has received fuller judicial recognition, its opposing considerations necessarily have been forced to give way. See generally, Murphy, *Academic Freedom—An Emerging Constitutional Right*, 28 Law and Contemporary Problems 447 (1963).

1. *The statutes impose as conditions of public employment prohibitions of constitutionally protected behavior.*

We are met at the outset with the unlimited and indiscriminate breadth of the statutes and rules here under attack. The sweep of the statutes is measured by the requirement that no person shall be appointed to or retained in the public service who

"By word of mouth or writing wilfully and deliberately advocates, advises or teaches the doctrine that the Government of the United States, or of any state or of any political subdivision thereof should be overthrown or overturned by force, violence, or any unlawful means;" (Civil Service Law, Section 105(1)(a))

or who

"Prints, publishes, edits, issues or sells, any book, paper, document or written or printed matter in any form, containing or advocating, advising or teaching the doctrine that the Government of the United States or of any state or of any political subdivision thereof should be overthrown by force, violence or any unlawful means, and who advocates, advises, teaches, or embraces the duty, necessity or propriety of adopting the doctrine contained therein;" (Civil Service Law, Section 105(1)(b))

and also by the fact that academic personnel can be removed

"* * * for the utterance of any treasonable or seditious word * * * or the doing of any treasonable or seditious act * * *" (New York Education Law, Section 3021)

and by reason of the fact that academic personnel can be removed

"* * * for the utterance of any treasonable or seditious word or words or the doing of any treasonable or seditious act or acts while holding such position." (New York Civil Service Law, Section 105(3))

where such words or acts are punishable by loss of employment and by imprisonment for not more than ten years or a fine of not more than $5,000.00 or both for anyone who

"prints, publishes, edits, issues or knowingly circulates, sells, distributes or publicly displays any book, paper, document or written or printed matter in any form, containing or advocating, advising or teaching the doctrine that organized government should be overthrown by force, violence, or any unlawful means;" (New York Penal Law, Section 161(2))

"Openly, wilfully and deliberately justifies by word of mouth or writing the assassination or unlawful killing

or assaulting of any executive or other officer of the United States or of any state or for any civilized nation having an organized government, because of his official character, or any other crime, with intent to teach, spread, or advocate the propriety of the doctrines of criminal anarchy;" (New York Penal Law, Section 161(3))

"Organizes or helps to organize or becomes a member of or voluntarily assembles with any society, group or assembly of persons formed to teach or advocate such doctrine." (New York Penal Law, Section 161(4)).

Included within the literally hundreds of proscriptions contained within the above paragraphs is conduct and language which the Supreme Court has often recognized in the past as constitutionally protected. As it stands, Section 161 of the Penal Law would prohibit a professor from distributing to his students copies of certain of the federalist papers or copies of the Declaration of Independence. Where one is prohibited from the utterance of any word of "Criminal Anarchy", he is prohibited from discussing in the most abstract manner, those political doctrines which are today opposed to ours; indeed, the Appellate Division of the New York Supreme Court has been of the opinion that the writings of Karl Marx fall within the condemnation of the Penal Law sections. See *In re Lithuanian Workers' Literature Soc.*, 196 App. Div. 262, 187 N. Y. Supp. 612 (2nd Dept. 1921). The section would also prohibit the carrying on a public street by a university professor of a copy of the Communist Manifesto; "* * * publicly displays any book * * * containing * * * the doctrine that organized government should be overthrown by force * * *", Penal Law, Section 161(2). Furthermore, membership in groups which predict the overthrow of the United States Government by force or violence is proscribed; "* * * shall be overthrown * * *", New York Civil Service

Law, Section 105(1)(c). Additionally, teaching Marxist principles is forbidden since no one shall obtain or retain public employment who "* * * teaches the doctrine that the Government of the United States * * * should be overthrown or overturned by force * * *", New York Civil Service Law, Section 105(1)(a). Marxism as a doctrine espouses the notion that capitalistic governments should be overturned by force. To teach the doctrine is here under these statutes forbidden. New York Penal Law, Sections 160 and 161 are similarly objectionable with the added feature of making such conduct crimes.

In addition to forbidding innocent activity and belief, the statutes here under consideration prohibit public employment to one who "* * * voluntarily assembles with any society, group or assembly of persons formed to teach or advocate such doctrine", Penal Law, Section 161(4). Thus phrased, the proviso is clearly repugnant to the United States Constitution. The provision would deprive a university professor of his employment merely for attending a meeting of one of the groups proscribed. Also, this provision bars one, on loss of employment, from attending a discussion which is directed toward political and social change through peaceful democratic methods merely because the group sponsoring such discussion is one which falls within the prohibition of the statute. As such, the statute falls squarely within the holding of *Dejonge v. Oregon*, 299 U. S. 353, and is clearly unconstitutional.

Also included within the prohibitions of the above sections is a college faculty member who

> "* * * edits * * * any book * * * containing * * * the doctrine that the Government of the United States or of any State or of any political subdivision thereof should be overthrown by force * * * and who * * * embraces the * * * propriety of adopting the doctrine

contained therein * * *" (Civil Service Law, Section 105(1)(b))

Or who

"prints * * * any * * * document * * * containing * * * the doctrine that the Government of the United States or of any state or of any political subdivision thereof should be overthrown by force * * * and who * * * embraces the * * * propriety of adopting the doctrine contained therein * * *" (Civil Service Law, Section 105(1)(b))

Or who

"* * * publishes * * * any * * * printed matter in any form containing * * * the doctrine that the Government of the United States or of any state or of any political subdivision thereof should be overthrown by force * * * and who * * * embraces the duty * * * of adopting the doctrine contained therein * * *" (Civil Service Law, Section 105(1)(b))

Or who

"* * * issues * * * any book * * * containing * * * the doctrine that the government of the United States or of any state or of any political subdivision thereof should be overthrown by force * * * and who * * * embraces the * * * necessity * * * of adopting the doctrine contained therein * * * " (Civil Service Law, Section 105(1)(b))

Or who

"* * * sells any book * * * containing * * * the doctrine that the Government of the United States or of any state or of any political subdivision thereof should be overthrown by force * * * and who * * * embraces the * * * propriety of adopting the doctrine contained therein * * * " (Civil Service Law, Section 105(1)(b))

Or who

"* * * issues * * * any book * * * teaching the doctrine that the Government of the United States * * * should be overthrown by force * * * and who * * * embraces the * * * propriety of adopting the doctrine contained therein * * *" (Civil Service Law, Section 105(1)(b))

Or who

"By word of mouth or writing * * * deliberately * * * teaches the doctrine that the Government of the United States * * * should be overthrown * * * by force, violence or any unlawful means * * *" (Civil Service Law, Section 105 (1)(a))

Or who

"By word of mouth or writing wilfully and deliberately * * * advises * * * the doctrine that the Government of the United States * * * should be overthrown * * * by force * * *" (Civil Service Law, Section 105(1)(a))

Or who

"* * * knowingly circulates * * * any book * * * containing * * * the doctrine that organized government should be overthrown by force * * *" (New York Penal Law, Section 161(2))

Or who

"* * * distributes * * * any * * * printed matter * * * teaching the doctrine that organized government should be overthrown by force * * *" (New York Penal Law, Section 161(2))

Or who

"* * * edits * * * any book * * * advocating * * * the doctrine that organized government should be overthrown by force * * *" (New York Penal Law, Section 161(2))

Or who

"* * * publicly displays any book * * * containing * * * the doctrine that organized government should be overthrown by force * * *" (New York Penal Law, Section 161 (2)).

The above proscriptions, taken from the very language of the statutes themselves, indicate the unconstitutional reach of the enactments under consideration. The prohibitions reach not only distribution of proscribed doctrine *per se* (New York Penal Law, Sections 160, 161) but also distribution of the proscribed doctrine when coupled with

the distributing persons personal belief as to the "* * * duty, necessity or propriety of adopting the doctrine contained therein * * *" (New York Civil Service Law, Section 105(1)(b)).

Thus, New York bars from public employment not only those who do certain innocent acts, but those who believe in forbidden ideas and concepts as well.

Even more startling is the fact that a university professor can be barred from public employment if he does not write the article in question or participate in its preparation. This will be the case if he publishes, prints, edits, issues or sells, a document "containing" proscribed articles when he believes the doctrine enunciated ought to be accepted.

Also under the statute a professor who "publicly displays" a book to his students which either "contains" (without advocating) or teaches proscribed doctrine is guilty of a "seditious act". (New York Civil Service Law, Section 105(3); New York Penal Law, Section 161(2)).

Furthermore, "the doctrine' enunciated in the article, may not be of the type which could be considered to "advocate" the destruction of the government. This can be observed by the inclusion of the phrase "containing *or advocating*" in New York Civil Service Law, Section 105(1)(b).

Additionally, the professor is barred not for advocating the destruction of the United States Government as is apparently the case in New York Civil Service Law, Section 105(1)(c), but for "* * * advocating * * * the doctrine * * *" (New York Civil Service Law, Section 105(1)(b)) or "* * * teaching the doctrine that the Government of the United States * * * should be overthrown by force * * *"

(New York Civil Service Law, Section 105(1)(b)). Thus, the statutes in question reach those who teach these doctrines without themselves inciting others to attempt to commit any acts. It is, therefore, the dissemination and advocacy of doctrine as doctrine which is forbidden.

Additionally, the New York Legislature by coupling certain innocent activities with an individual's state of mind—"embraces the duty" (New York Civil Service Law, Section 105(1)(b))—has not saved but only further raised constitutional questions of a most serious order.

The Supreme Court of the United States has clearly indicated that an attempt to proscribe abstract doctrine or mere belief must fail; and that dictating beliefs as a condition of governmental employment must fail. In plain language, New York has made beliefs in certain forbidden concepts a ground of exclusion from the teaching profession of the State.

In *Torcaso v. Watkins,* 367 U. S. 488, the United States Supreme Court held that a state cannot compel a belief in the existence of God as a test for office in the State of Maryland. Let it be said that neither can the State of New York forbid beliefs of any type as a condition for employment of university professors and scholars. To punish such a person by refusing him employment in his chosen field merely for holding a belief is an invasion of the mind of a most fundamental nature. To attempt to forbid certain beliefs which enjoy little current favor is nothing more than state imposed thought control. A statute which conditions employment by forbidding beliefs is clearly beyond state action. Should members of the NAACP or the Minutemen of America, or the Ku Klux Klan be prohibited from teaching in the schools merely because of what they believe? Certainly there are some

areas of the country where these groups are considered a very great danger to the established order. A state cannot require that its teachers have closed minds on some subjects regardless of their conscience. There can be no rational relationship between forbidding beliefs and a person's fitness for teaching unless we indulge in the unwarranted assumption that beliefs will always emerge as acts. The above provisions go far beyond qualifications for employment, they constitute punishment. Only the naive will say that banishment from public employment as a university professor does not constitute punishment. But more importantly, a social order has begun its slow decline when it attempts to regulate the thoughts of its members. Philosophies and political notions are transient things, they shift and change and are reorientated. This is the view which must be taken by a legal system when confronted with legislation, often embodying the prejudices and passions of the many. There can be no legal justification for thought control.

> "But freedom to differ is not limited to things that do not matter much. That would be a mere shadow of freedom. The test of its substance is the right to differ as to things that touch the heart of the existing order." *West Virginia v. Barnett,* 319 U. S. 624 at 642.

The District Court below attempted to save the statutes here under attack by ignoring the troublesome language contained therein and by focusing instead on the words "force and violence" in the statutes. Thus, the court stated in its opinion (Record, p. 292):

> "Legitimate activities are not deterred by these sections of the statutes. Not teaching Communist theory in a course in economic or political history; only teaching that government shall or should 'be overthrown * * * by force' is a basis for adverse consequences under these sections."

It seems clear, therefore, that the District Court found that the statutes, administrative rules and procedures, involved in this lawsuit merely proscribe a designation for employment tightly keyed to knowing advocacy that the Government of the United States should be overthrown by force or violence and that the Feinberg Law merely implements this disqualification in the university system of the State. In reaching this conclusion, the District Court erred.

As indicated earlier in this brief, the proscriptions involved in this lawsuit run into the hundreds and many bear no true relation to force or violence. Each of the proscriptions must be considered separately as each can be separately applied. An unconstitutional enactment is not to be saved simply by lumping a multitude of prohibitions into one statutory paragraph. It is not possible to save these statutes by indicating that the "sense" of the enactment relates to force or violence. This is so because we deal here not with a single specific prohibition but with a multitude of independent activities each capable of being set out apart from the rest of the statute and capable in the process of being independently enforced. It should be remembered that the appellants involved here, as well as hundreds of educators in the New York State University system have been required to consent that *all* of these offensive statutes shall form a part of their employment and contract terms. Furthermore, this Court should note that linked with these statutes is a means of enforcement spelled out in the "Regents Rules of Subversive Activities" which provides for a systematic and continuous surveillance in which the public authorities are admonished to watch for a violation of "any of these provisions".

There can be little doubt that where statutes of such all encompassing breadth as these, are made part of the terms of a scholar's contract of employment at a state university,

and where such employment is conditioned upon acceptance of such terms, that the "ardor and fearlessness of scholars" will certainly be checked. In the light of these statutes, it is well to remember that "we need not pause to consider whether an abstract right to public employment exists. It is sufficient to say that constitutional protection does extend to the public servant whose exclusion pursuant to a statute is patently arbitrary or discriminatory". *Weiman v. Updegraff*, 344 U. S. 183 at 192 (1952); see also *Shelton v. Tucker, supra,* (when conditions to public employment restrict First Amendment freedoms, it is no longer sufficient that they be merely 'not patently arbitrary or discriminatory', they must meet the standards of a full scale 'balancing' test). The statutes, administrative rules and regulations, in their breadth are unreasonable. As applied to faculty university personnel, they constitute and "* * * unwarranted inhibition upon the free spirit of teachers * * *" and have "* * * an unmistakable tendency to chill that free play of the spirit which all teachers ought especially to cultivate and practice; * * *" making " * * * for caution and timidity in their associations * * *" *Weiman v. Updegraff*, 344 U. S. 183, 195. (concurring opinions).

2. *The statutes, administrative rules and procedures further intrude into constitutionally protected areas of speech and association for the reason that they impose, through conditions to employment, a broader proscription of speech than could be constitutionally imposed by means of a direct restriction in their (1) failure to distinguish between advocacy of abstract doctrine and advocacy that incites to action, and (2) in their failure to distinguish between active and passive membership in proscribed organizations.*

It will be observed from a close analysis of the statutes in question that aside from issues involving innocent con-

duct and speech which are clearly protected by the United States Constitution that the State of New York has forbidden other conduct and speech upon a lesser standard than do the Smith Act cases. Thus, for example, New York Civil Service Law, Section 105(1)(b) makes one ineligible for public employment who "* * * edits * * * any book * * * teaching the doctrine that the Government of the United States * * * should be overthrown by force * * * and who * * * teaches * * * the * * * propriety of adopting the doctrine contained therein * * *". Also, New York Penal Law, Section 161(1) makes one guilty of a seditious utterance who "by word of mouth or writing, advocates, advises or teaches the duty, necessity or propriety of overthrowing or overturning organized government by force or violence * * *".

These proscriptions must be compared with the admonition of this Court that "we held in Yates, and we reiterate now, that the * * * teaching of the moral propriety or even moral necessity for a resort to force and violence, is not the same as preparing a group for violent action and steeling it to such action." *Noto v. United States,* 367 U. S. 291 at 297-298 (1961).

Furthermore, while it appears that the word or act must be done "wilfully and deliberately", New York Civil Service Law, Section 105(1)(a) or "knowingly", New York Penal Law, Section 161(2), neither Civil Service Law, Section 105(1)(2) or (3) or Education Law, Section 3021, or Penal Law, Section 160, or Section 161(1), (2), and (4), indicate that there must be an intent to bring about a substantive evil or intent to use or solicit the use of force or violence. (See New York Penal Law, Section 161(2), "* * * publicly display any book * * * containing * * * the doctrine that organized government should be overthrown

by force.") In other words, the statutes contain nothing beyond the prohibition of the expression or promotion of the expression of the doctrine itself. Thus the statutes impose punishment whether by civil, *e. g.,* loss of employment, or by criminal sanctions without regard to injury or the specific intent to cause injury. Of course, even a specific intent to cause injury without more, would not be enough under the standards imposed by this Court.

In *Yates v. United States,* 354 U. S. 298 (1957), this Court carefully marked off the boundaries of the First Amendment and in doing so, construed the Smith Act Section in such a way as to meet constitutional objections thereto. This Court stated at page 318:

> "We are thus faced with the question whether the Smith Act prohibits advocacy and teaching of forceful overthrow as an abstract principle, divorced from any effort to instigate action to that end, so long as such advocacy or teaching is engaged in with evil intent. We hold that it does not."

It is true that the *Yates* case was decided upon a statutory construction, not a holding of constitutional law, but in its own words, the Court was skirting the edges of "a constitutional danger zone * * * clearly marked". (*Yates, supra,* at 319). Thus, the court in *Yates* clearly distinguished between advocacy of forceful overthrow in itself and incitement of action to that end, a distinction nowhere evident in this complex.

Apart from the actual speech sections of this complex, it should be observed that in New York punishment is imposed for membership in proscribed groups which membership need not be "active", *Scales v. United States,* 367 U. S. 203, only "knowing", *Thompson v. Wallin,* 301 N. Y. 476 at 494.

The District Court below did not consider the legal issues raised by the broad standards of disqualification imposed by these statutes despite the fact that legal issues were fully briefed. Apparently the Court accepted the contention of the appellees that the Smith Act cases are not in point, at least with respect to the civil portions of this complex. It is submitted that the District Court erred. Counsel maintain that the Smith Act cases define the area of maximum reach which statutes can have when they admittedly infringe upon First Amendment freedoms. It is no argument to state that the standards imposed by the Smith Act cases apply only to those statutes where the activity would result in criminal prosecutions. The standards cannot be any less simply because the punishment imposed here is loss of public employment. See *e. g. Aptheker v. Secretary of State,* 378 U. S. 500 and *Elfbrandt v. Russell,* 34 U. S. L. W. 4347 (indicating that active membership in proscribed organizations with an intent to further the unlawful aims of the organization is the standard by which employment or travel may be denied).

To adhere to a standard less rigid than the Smith Act cases enormously expands the State's capacity for restraint and suppression of First Amendment freedoms. Academic discussion, attempts to persuade, along with knowing but inactive membership all fall within the bar of a state's power. To give a state such power in effect allows it to penalize all advocacy of legislatively prohibited doctrines, regardless of their immediacy to violence or their generation of public disorder. Thus, for the reasons set out above, the statutes are unconstitutional.

C. The statutes, administrative regulations and procedures, infringe upon freedom of expression in that they use terms which are vague, fluid and indefinite.

a. With respect to its various parts.

Section 3021 of the New York Education Law requires the removal of academic personnel "* * * for the utterance of any treasonable or seditious word * * *". Phrased thus broadly and loosely, it is on its face repugnant to the Federal Constitution. Its vagueness deprives appellants of due process and its proscriptions clearly act as an impermissible deterrent to First Amendment liberties. We should ask ourselves is "down" a seditious word? Is "down with the United States Government" a seditious phrase?

Justice Frankfurter, by way of dicta, has indicated clearly the problem which Section 3021 poses. Dissenting in *Adler v. Board of Education of the City of New York, supra,* at 506, he stated:

> "We are not told the meaning to be attributed to the words, 'treasonable or seditious' in § 3021 of the Education Law, though that is one of the two sections of preexisting law which the elaborate apparatus of the Feinberg Law is designed to enforce. In light of the experience under the Sedition Act of 1798, 1 Stat. 596, 'seditious' can hardly be deemed a self-defining term or word of art."

Subdivision (3) of Section 105 of the New York Civil Service Law contains language similar to Section 3021 and, therefore, is similarly questionable. Subdivision (3) requires the discharge of any civil servant "* * * for the utterance of any treasonable or seditious word or words or the doing of any treasonable or seditious act or acts * * *". Unlike Section 3021, this subdivision states that "seditious" shall mean "criminal anarchy" as defined in the

Penal Law. These definitions, however, do not ameliorate the vagueness of the words purportedly defined. On the contrary, Section 105, paragraph 3, by equating "sedition" with "criminal anarchy" only further aggravates language already unconstitutionally vague. "Criminal anarchy" is defined in Sections 160 and 161 of the Penal Law; the range of prohibitions with respect to this section have already been explored.

To defend Sections 160 and 161 by referring to the case of *Gitlow v. New York,* 268 U. S. 652 (1925), is to overlook the present status of *Gitlow.* Justice Frankfurter, while acknowledging that *Gitlow* had never been explicitly overruled, stated nevertheless that "* * * it would be disingenuous to deny that the dissent in *Gitlow* has been treated with the respect usually accorded to a decision." *Dennis v. United States,* 341 U. S. 494 at p. 541 (1951).

The Court below, attempted to save the penal provisions of the complex with the simple declaration that the "looser language" of Section 161 was not before it.

Subdivision (3) of Section 105 of the New York Civil Service Law is captioned "Removal for Treasonable and Seditious Acts or Utterances" and provides:

> "A person in the Civil Service of the State or of any civil division thereof shall be removable therefrom for the utterance of any treasonable or seditious word or words or the doing of any treasonable or seditious act or acts while holding such position. For the purpose of this subdivision, a treasonable word or act shall mean 'treason' as defined in the Penal Law; a seditious work or act shall mean 'criminal anarchy' as defined in the Penal Law."

Section 160 of the Penal Law provides:

> "Section 160. Criminal anarchy defined. Criminal anarchy is the doctrine that organized government should be overthrown by force or violence, or by as-

sassination of the executive head or of any of the executive officials of the government, or by any unlawful means. *The advocacy of such doctrine either by word of mouth or writing is a felony.*" (Emphasis supplied).

Section 161 of the New York Penal Law is entitled "Advocacy of Criminal Anarchy". The section provides punishment for:

> "Any person who: By word of mouth or writing advocates, advises or teaches the duty, necessity or propriety of overthrowing or overturning organized government by force or violence or by assassination of the executive head or of any of the executive officials of government or by any unlawful means; or,
>
> Prints, publishes, edits, issues or knowingly circulates, sells, distributes or publicly displays any book, paper, document or written or printed matter in any form, containing or advocating, advising or teaching the doctrine that organized government should be overthrown by force, violence or any unlawful means; or
>
> Openly, wilfully and deliberately justifies by word of mouth or writing the assassination or unlawful killing or assaulting of any executive or other officer of the United States or of any state or of any civilized nation having an organized government, because of his official character, or any other crime, with intent to teach, spread or advocate the propriety of the doctrines of criminal anarchy; or
>
> Organizes or helps to organize or becomes a member of or voluntarily assembles with any society, group or assembly of persons formed to teach or advocate such doctrine."

It is clear that Sections 160 and 161 are intimately bound together. "The advocacy of such doctrine" is obviously defined in Section 161 and as such constitutes a part of the complex involved here and is incorporated into Civil Service Law, Section 105(3). There is no need to search for the definition of "advocacy". The State Legislature of New York has set out the definitions in Section

161. The serious constitutional questions raised by these definitions cannot be avoided merely by leaving out the operative sentence of Section 160 (See opinion of the Three Judge District Court, Record p. 259).

The irony involved in the District Court's attempt to save the statute is that by limiting the definition of criminal anarchy to that provided in Section 160 the District Court actually expanded rather than limited Civil Service Law, Section 105, Subdivision (3). This is the case since a definition cannot be considered in a vacuum. It can only be considered in the context of speech. Thus, the District Court failed to take account of the fact that subdivision (3) of Section 105 of the New York Civil Service Law prohibits the "utterance of any * * * seditious word or words". Of course, to utter is to speak. By refusing to include Section 161 as a part of the complex, the District Court thus expanded the range of prohibitions to include all words spoken which relate to the doctrine that organized government should be overthrown by force or violence, *except words of advocacy.* Thus, the District Court vastly expanded the area of prohibitions involved in this case. Counsel for the Attorney General of the State of New York and counsel for the State University of New York have apparently recognized this fact since at no proceedings involved in this case from its inception through all the oral arguments and briefs herein, have they denied that the language of Section 161 is included in the complex before this Court. Neither have they denied that a violation of that provision would result in dismissal proceedings under the complex as indeed they could not since the New York Court of Appeals has indicated that Sections 160 and 161 are to be construed together.

> "James Larkin, Benjamin Gitlow, C. E. Ruttenberg, and Isaac E. Ferguson, were indicted, tried and convicted of the crime of criminal anarchy *as defined by*

Sections 160 and 161 of the Penal Law * * *", *People v. Gitlow*, 234 N. Y. 132, at 135 (Emphasis supplied).

The District Court further erred in its holding that the vagueness of Section 3021 of the Education Law has been clarified. It cannot be declared that the references appended to the words "treasonable" and "seditious" in Section 105, paragraph 3 of the Civil Service Law are in some way applicable as well to Section 3021 of the Education Law. There exists no support for this view. Neither the Courts of New York nor its Legislature have construed, amended, or in any way clarified Section 3021 since the time of its enactment. While the New York Supreme Court has stated "* * * § 3021 of the Education Law and § 12-A (now 105) of the Civil Service Law must be given consideration in passing upon the validity of [Section 3022 of the Education Law]", *Thompson v. Wallin*, 196 Misc. 686, 93 N. Y. S. 2d 274, 281 (1949), rev'd. 276 App. Div. 463, 95 N. Y. S. 2d 784 (1950), aff'd. 301 N. Y. 476, 95 N. E. 2d 806, aff'd. *Sub Nom.*, 342 U. S. 485 (1952), it has never been suggested that Section 3021 and Section 105(3) must be construed together. Similarity of language alone cannot put statutory provisions *in pari materia*. Moreover, even if the sections in question were required to be construed together, it has been noted that the references in Section 105(3) to the Penal Law are no cure to its vagueness.

Certain of the offending portions of the complex are at least clear and unambiguous. One knows for example, whether or not one is a member of the Communist Party. It is another matter, however, to have uttered a seditious word and be barred from public employment and criminally prosecuted when a college professor "* * * justifies by word of mouth * * * the * * * unlawful * * * assaulting of any executive * * * of * * * any civilized nation having an

organized government * * * or any other crime with intent to * * * spread * * * the propriety of the doctrines of criminal anarchy * * *" New York Penal Law, Section 161(3). We are not told what is meant by a "civilized nation" having "organized government". Of course, political scientists have argued for years over the point at which a government becomes "organized". Furthermore, "justifies" embraces a multitude of acts so broad as to be limited only by the hearer's prejudices. The range of behavior proscribed by "* * * justifies * * * any other crime * * *" is so broad as to define comprehension. "Advises", "teaches", "necessity", "propriety", "doctrine", are concepts blurred in the charged emotions of today's world. Past history shows it is not only the ignorant who would drag all those who pursue social reform into the Communist camp but too often also judges, prosecutors, legislators, and candidates for all those offices.

Still another impermissible feature of the complex is the use of the phrase "helps to organize", Civil Service Law, Section 105(1)(c); New York Penal Law, Section 161(4). To be required to ascertain whether one has helped to organize is to surrender completely to hopeless confusion. It catches the assistant to the assistant.

The present suit complains, *inter alia,* of the breadth and vagueness of the requirement in Section 105(3) of the Civil Service Law that no academic employee utter "* * * any * * * seditious word or words" or engage in any "* * * seditious act or acts * * *." Moreover under the construction of the complex by the District Court below, seditious words or acts shall not include words of advocacy or conduct as defined by Section 161 of the Penal Law. It is submitted that the complex is unconstitutional under either construction, and that the District Court in attempting

to save the complex eliminated any possible guide to ascertainable conduct. What then qualifies as a seditious word or act?

The questions which Justice White found to be left open by the Washington Statute in *Baggett v. Bullitt*, 377 U. S. 360, are similarly left open by the statutes presently complained of. See *Baggett, supra*, at 366-73. Does a treasonable or seditious utterance "* * * reach support for communist candidates for office?" Does this language reach those who support the constitutional rights of the communist party or its members or anyone who supports a like cause? The breadth of the statutes involved makes it obvious that no answer can be given to these questions.

The Washington Statute prohibited the advocacy of alteration of government by revolution, while the New York Statute prohibits the mere advocacy of overturning government by any unlawful means. These proscriptions cannot be reconciled; the New York statute is equally as vague in this respect as the Washington Statute was found to be.

In *Cramp v. Board of Public Instruction*, 368 U. S. 278, the Supreme Court found unconstitutionally vague the requirement that a teacher not lend "* * * aid, support, advice, counsel or influence to the communist party". *Id.* at 279. Far more vague is the requirement presently complained of that no academic personnel engage in "treasonable or seditious acts." Both requirements would proscribe constitutionally protected conduct, yet the latter leaves far more room for argument as to the quantum and quality of the conduct which it proscribes.

It should be noted that the statutes in the present case, while proscribing advocacy of violent overthrow of state or federal government and membership in the Communist

Party, go far beyond this relatively definable behavior. As suggested in *Cramp v. Board of Public Instruction, supra,* at page 286, and in *Baggett v. Bullitt, supra,* at page 370, language less susceptible of objective understanding than this should be scrutinized closely.

It has been suggested that the mere use of such words as "Communist Party", "overthrow", "force", and "violence", in the statute will save it from the defects of vagueness. However, in *Baggett v. Bullitt, supra,* this Court held unconstitutionally vague a statute which contained such words as "advocates", "abets", "advises", "teaches", "overthrow", "destroy", "alter", "revolution", "force", and "violence".

Baggett makes clear that a statute which is overly broad and comprehensive will not be saved simply because such terms are used. Clearly the key to the *Baggett* and *Cramp* holdings is that undefined, indefinite and comprehensive terms cannot be said to take their substance from other terms which are "susceptible of objective measure".

The New York complex, like that of *Cramp* and the statute in *Baggett,* is also deficient in that:

> "The vice of unconstitutional vagueness is further aggravated where, as here, the statute in question operates to inhibit the exercise of individual freedoms affirmatively protected by the Constitution, 368 U. S. 278, 287. We are dealing with indefinite statutes whose terms, even narrowly construed, abut upon sensitive areas of basic First Amendment freedoms. The uncertain meanings of the oaths require the oath taker—teachers and public servants—to 'steer far wider of the unlawful zone', *Speiser v. Randall,* 357 U. S. 513, 526, than if the boundaries of the forbidden areas were clearly marked. Those with a conscientious regard for what they solemnly swear or affirm, sensitive to the perils posed by the oath's indefinite language, avoid the risk of loss of employment, and perhaps

> profession, only by restricting their conduct to that which is unquestionably safe. Free speech may not be so inhibited. *Smith v. California*, 361 U. S. 147; *Stromberg v. California*, 283 U. S. 359, 369. See also *Herndon v. Lowry*, 301 U. S. 242; *Thornhill v. Alabama*, 310 U. S. 88; and *Winters v. New York*, 333 U. S. 507". *Baggett, supra*, at pages 372-3.

This Court has continuously repeated the above quoted standards and principles when confronted with a variety of factual situations not necessarily similar to the case at bar. See *e. g., NAACP v. Button*, 371 U. S. 415. As such, they underscore the fact that they transcend factual patterns and are of fundamental significance where First Amendment freedoms are at stake. We here emphasize that profound constitutional questions involving basic First Amendment freedoms cannot be resolved by the use of simple formulae as has been suggested.

Compared to the language of this statutory complex the provisions involved in *Cramp* and *Baggett* were stark and rigid both in outline and detail. Yet it is the language of this complex which the State of New York has declared constitutes the employment terms of the academic personnel involved in this case. For a violation of any of these proscriptions, the party involved would be ineligible for continued employment and possibly criminally prosecuted.

It is no argument to state that the statutes can be saved because an element of scienter could be read into them. In *Weiman v. Updegraff*, 344 U. S. 183 (1952), the Court reviewed its decisions in *Adler v. Board of Education*, 342 U. S. 485; *Garner v. Board of Public Works*, 341 U. S. 716 (1951) and *Gerende v. Board of Supervisors*, 341 U. S. 56 (1951), concluding that a state loyalty statute would be upheld in any case where a requirement of scienter was made explicit in the statute. See *Morris, Baggett v. Bullett:*

Scienter and "Guiltless Knowing Behavior", 1 Law in Trans. Q. 185, 208 (1964). Presently, however, scienter, without more will not uphold a loosely worded academic loyalty statute and most certainly for our purposes a loosely worded statute imposed as employment conditions on university professors. Recognizing at once the need to preserve academic freedom, and the fact that permissible academic inquiry is deterred by a vague and indefinite statute regardless of how knowing the actor's behavior may be, the Court has recently ruled that a state loyalty statute, with or without scienter, is unconstitutional if its effect is to deter free inquiry. See *Baggett v. Bullitt, supra, Cramp v. Board of Public Instruction,* 368 U. S. 278 (1961). As was said in *Baggett, supra,* at page 368:

> "The susceptibility of the statutory language to require foreswearing of an undefined variety of 'Guiltless Knowing Behavior' is what the Court condemned in *Cramp.* This statute, like the one at issue in *Cramp,* is unconstitutionally vague."

It is plain that the rule against vagueness has special force where the uncertainty pertains to the right of political expression. This is true because uncertainty in this area operates as a prior restraint upon communications, the most noxious form.

In a series of cases, the Supreme Court has held that a state has no power, under the First and Fourteenth Amendments, to forbid or command an act which is defined by terms so fluid and vague as not to be susceptible to objective measurement thereby forcing men of common intelligence to guess at its meaning and to differ as to its applications. *Winters v. New York,* 333 U. S. 507, *Lanzetta v. New Jersey,* 306 U. S. 451, and the cases cited therein. The Supreme Court in *Smith v. California,* 361 U. S. 147, at page 151, declared:

> "This Court has intimated that stricter standards of permissible statutory vagueness may be applied to a statute having a potentially inhibiting effect on speech; a man may be the less required to act at his peril here, because the free dissemination of ideas may be the loser."

No one can deny that the sweeping breadth and scope of prohibited conduct with its threats of possible imprisonment as well as loss of employment, constitute the type of statutory scheme which will inhibit and deter the First Amendment freedoms of those to whom our society has need to give the freest rein of intellectual inquiry—university professors and scholars. It is not enough to say that criminal sanctions may be remote. "What matters is the existence of the weapon. Once the sword is placed in the hands of the people in power, then, whatever it says, they will be able to reach and slash at almost any unpopular person who is speaking or writing anything that they consider objectionable criticism of their policies." (Chafee, Z., Freedom of Speech 466 (1941)). With respect to this area, the language of the Supreme Court in the case of *NAACP v. Button, supra,* is worth quoting *in extenso.*

> "But it does not follow that this Court now has only a clear cut task to decide whether the activities of the petitioner deemed unlawful by the Supreme Court of Appeals are constitutionally privileged. If the line drawn by the decree between the permitted and the prohibited activities of the NAACP, its members and lawyers is an ambiguous one, we will not presume that the statute curtails constitutionally protected activity as little as possible. For standards of permissible statutory vagueness are strict in the area of free expression. See *Smith v. California,* 361 U. S. 147, 151; *Winters v. New York,* 333 U. S. 507, 509-510, 517-518; *Herndon v. Lowry,* 301 U. S. 242; *Stromberg v. California,* 283 U. S. 359; *United States v. C. I. O.,* 335 U. S. 106, 142 (Rutledge, J., concurring). Furthermore, the instant decree may be invalid if it prohibits privileged ex-

ercises of First Amendment rights whether or not the record discloses that the petitioner has engaged in privileged conduct. For in appraising a statute's inhibitory effect upon such rights, this Court has not hesitated to take into account possible applications of the statute in other factual contexts besides that at bar. *Thornhill v. Alabama,* 310 U. S. 88, 97-98; *Winters v. New York, supra,* at 518-520. *cf. Staub v. City of Baxley,* 355 U. S. 313. It makes no difference that the instant case was not a criminal prosecution and not based on a refusal to comply with a licensing requirement. The objectionable quality of vagueness and over-breadth does not depend upon absence of fair notice to a criminally accused or upon unchanneled delegation of legislative powers, but upon the danger of tolerating, in the area of First Amendment freedoms, the existence of a penal statute susceptible of sweeping an improper application.[14] *cf. Marcus v. Search Warrant,* 367 U. S. 717, 733. These freedoms are delicate and vulnerable, as well as supremely precious in our society. The threat of sanctions may deter their exercise almost as potently as the actual application of sanctions. *cf. Smith v. California, supra,* at 151-154; *Speiser v. Randall,* 357 U. S. 513, 526. Because First Amendment freedoms need breathing space to survive, government may regulate in the area only with narrow specificity. *Cantwell v. Connecticut,* 310 U. S. 296, 311." *NAACP v. Button,* at pp. 432-3.

b. The statutory complex *per se* is vague.

The Trustees Certificates, either one of which all academic personnel prior to June 10, 1965 had to sign as a condition of their employment, incorporate by reference Article XVIII, Section 244 of the Rules of the Board of Regents. Both the Trustees Certificate and the Regents Rules were adopted pursuant to the authority given in Section 3022, paragraph 1 of the New York Education Law. The rules and the statutes in this proceeding still constitute the terms of employment for academic personnel by reason

of the resolutions adopted on June 10, 1965. The Regents Rules, in turn, incorporate by reference both Section 3021 of the New York Education Law and Section 12-A (now Section 105) of the New York Civil Service Law, the former applying originally to non-civil service academic personnel only (*i.e.*, those in the exempt class), and the latter originally to civil service employees. Presently, however, Section 105 of the Civil Service Law, due to its incorporation by reference into both Section 3022 of the Education Law and the Regents Rules, applies alike to both academic and civil service employees. Conversely, the language of Section 3021 of the Education Law has been added to Section 105, paragraph 3 of the Civil Service Law, with a further reference to the New York State Criminal Anarchy Statute. Thus, those employed in an academic capacity must abide by the terms of both the Regents Rules and Section 3021 of the Education Law. Section 3022 of the New York Education Law was enacted for the purpose of applying the terms of Section 105 of the Civil Service Law to the public schools and, by amendment in 1953, to universities.

As observed by Justice Frankfurter, this statutory scheme is a highly complicated one and, moreover, it is tied to a highly complicated scheme of enforcement. See *Adler v. Board of Education of the City of New York,* 342 U. S. 485, 500 (1952) (dissenting opinion). The many references to interrelated parts, and the prolex and profuse language used therein unquestionably results in a confused and vague understanding of the behavior intended to be proscribed. Therefore, we here attack not only the various parts of the scheme severally, but also the statutory complex *per se* as being so incapable of being understood as to constitute a denial of due process. When we combine this statutory complex with the means of enforcement of the

statutes spelled out in the "Regents Rules on Subversive Activity", we have the sort of "systematic and continuous surveillance" referred to as a dubious possibility by Mr. Justice Frankfurter in his opinion in *Adler v. Board of Education*, 342 U. S. at 507.

The statutes, administrative rules, and procedures, which constitute the terms of employment of the academic personnel involved herein, and for violation of which they are ineligible for continued public employment, are unreasonable, and should be stricken as unconstitutional.

In considering the foregoing arguments, we ask this Court to consider that the threat of criminal prosecution permeates and pervades this statutory scheme. Many of the same acts which will result in a loss of public employment are defined as criminal. While it might be argued that the danger of prosecution is limited, the Supreme Court has stated that First Amendment freedoms are delicate and vulnerable as well as supremely precious in our society and that the threat of sanctions may deter their exercise almost as potently as the actual application of them. *cf. Smith v. California*, 361 U. S. 147 at 151-154; *Speiser v. Randall*, 357 U. S. 513, 526. Furthermore, "It would be blinking reality not to acknowledge that there are some among us always ready to fix a communist label upon those whose ideas they violently oppose. Experience teaches that prosecutors, too, are human". *Cramp v. Florida*, 368 U. S. 278 at 286-287. In times such as these with the rapid growth of extreme right-wing organizations, it is not unrealistic to consider the threat of prosecution a serious one. In addition, university professors and scholars are extremely vulnerable when operating under such broad and indefinite prohibitions. Their function is to examine, to question, to dispute, to explore, unorthodox and unpopular

notions. Thus, they are most apt to cause the passions of the community to become aroused. In circumstances such as those they can, under the penal provisions of this complex, be placed at the mercy of unsympathetic judges and juries. There may not be much hesitancy in reaching a verdict that someone who is unpopular is also a subversive and therefore a criminal. The criminal-civil complex before us, while not grounded on perjury, has the same weaknesses inherent within it which caused Mr. Justice Frankfurter (dissenting as to vagueness) in *American Communications Association v. Douds,* 339 U. S. 382 to declare at page 420:

> "It does not meet the difficulty to suggest that the hazard of a prosecution for perjury is not great since the convictions for perjury must be founded on willful falsity. To suggest that a judge might not be justified in allowing a case to go to a jury, or that a jury would not be justified in convicting, or that, on the possible happening of these events, an Appellate Court would be compelled to reverse, or, finally, that resort could be had to this Court for a review on a petition for certiorari, affords safeguards too tenuous to neutralize the danger".

D. The statutes, administrative regulations and procedures infringe upon freedom of expression and association and are unconstitutional in that (1) there is no State interest shown which is impelling; (2) there is no relation shown between the information sought and a subject of compelling interest; (3) the State purpose could be more narrowly achieved by less drastic means.

It is essential to recognize the full extent to which the statutes under consideration deter and inhibit First Amendment freedoms. It is plain that New York bars from public employment not only those who do certain inoffensive and innocent acts but also those who believe in certain forbidden ideas and concepts as well. Furthermore, by use of

procedural devices which will be elaborated upon below, the State subjects its professors to the burdens and strains of justifying their political ideas or conduct, and exposes them to the impact of an aroused public opinion while at the same time reserving to itself sanctions of striking effectiveness in curtailing associations, opinions, and activities. All this at a time when developments have taken place in the community where the individual, by reason of greater economic dependence and other pressures to conform, has become far more vulnerable to the kind of sanctions wielded by the State.

In light of the foregoing, this Court must carefully analyze the complex here under attack in order to determine if it meets the minimal standards which the Supreme Court has set for legislation of this type. There is no doubt that when state legislation invades First Amendment freedoms that there must be a subordinating state interest which is impelling. *Sweezy v. New Hampshire,* 354 U. S. 234; *Gibson v. Florida,* 372 U. S. 539. Furthermore, there must also be a substantial relation between the freedom regulated and the state's subordinating interest, *Gibson v. Florida, supra,* at page 546. Additionally, the legislation must be narrowly drawn and go no further than necessary to vindicate the state's interest and finally the burden of demonstrating each of the above is upon the state convincingly to show, *Gibson v. Florida, supra.* While the above cases dealt with the validity of an investigation which intrudes upon constitutionally protected First Amendment freedoms, the principles which they enunciate are applicable here, since the state cannot condition public employment where First Amendment freedoms are involved upon lesser standards.

The State of New York will defend its exclusionary system with its broad incursions into protected freedoms on

the ground of the state's need in securing fit and competent teaching personnel free of the taint of disloyalty and subversion. The state, however, declaring its need, has demonstrated none. There has been no showing of need for legislation of this type affecting thousands of university personnel. The legislative findings which were the basis for the Feinberg Legislation in 1949 dealt primarily with the state's need to protect its children from those it considered disloyal and whom it found were infiltrating its public schools. Those findings cannot be extended to cover faculty personnel on a university level without distorting the entire concept of state need for this type of legislation. Furthermore, the statutory amendment which applied this legislation to university personnel was passed in 1953 (see N. Y. Laws 1953, Ch. 681), four years after the findings which prompted the original legislation. There has been no showing that state findings were made with regard to the above amendment and which were used as a basis for it. In view of the foregoing, how can it be said that the state has demonstrated an impelling need for the legislation which affects these appellants? Where has there been a showing that the danger to the state's university system is great by reason of the activities of certain individuals who advocate views which a majority believes to be contrary to the notions which underlie our democracy? There is no showing. However, if this Court were to make the unwarranted assumption that the legislative findings which underlay the enactment of the Feinberg Legislation in 1949 are sufficient to support the 1953 amendment, then it should consider that such findings are stale. There is no invasion of state legislative function by so doing unless any scheme can find harborage within the concept of legislative function. The findings which prompted the Feinberg Law were made sixteen years ago and it cannot be assumed that

the danger still exists merely because the legislature has not acted. Such inaction will be defended upon the ground that the legislature is the best judge of a continuing danger. But we submit that it is First Amendment freedoms we are dealing with and the remoteness of the findings is certainly an element which the Court should consider.

Even assuming a valid demonstrative need, it is still necessary for the state to show a substantial relation between the activity prohibited and the subject of impelling need. The prohibitions in this case are wholesale.

New York has used a blunderbuss approach proscribing inoffensive and innocent acts, "• • • publicly displays any book • • • containing • • •", New York Penal Law, Section 161(2) as well as ideas and concepts, "• • • embraces the duty • • • of adopting the doctrine contained therein • • •", New York Civil Service Law, Section 105(1) (b), all of which bear no true relation to a subject of compelling need.

It is plain that the legislation before us has not been narrowly drawn to vindicate the state's interest. It is overly broad and comprehensive cutting a swath in vague and fluid terms across protected and innocent freedoms in an attempt to meet an undemonstrated need. As such, it is unconstitutional.

If we assume *arguendo,* a legitimate state need, the state is still not free to subjugate liberties if its desired ends can alternatively be achieved in a manner which is less restrictive of First Amendment rights.

> "In a series of decisions this Court has held that, even though the governmental purpose be legitimate and substantial, that purpose cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved.[8] The breadth of legislative abridgement must be viewed in the light

of less drastic means for achieving the same basic purpose'" *Shelton v. Tucker*, 364 U. S. 479, at 488.

In such instances, then, the Constitution requires that "the operation and effect of the method by which speech is sought to be restrained must be subjected to close analysis and critical judgment in the light of the particular circumstances to which it is applied", *id.* at 520.

Thus, those who adhere to the "balance" theory of First Amendment liberties, once they have found a subordinating state interest, must then use a second weighing scale. They must choose the best of possible alternatives. As between methods that can be used to exclude those legitimately disqualified from the teaching profession, that one must be chosen which has the least effect upon, and which will most likely preserve First Amendment liberties.

Applying this concept to the case at bar, it is submitted that the complex here is unconstitutional in that the state's purpose could obviously be accomplished in a manner which does not involve a wholesale invasion of the First Amendment. The statutes are a jumble of vague, broad, indiscriminately worded provisions which severely impair First Amendment rights without enhancement of a legitimate state interest and without any evidence that there are not less restrictive means available to accomplish the basic state purpose. The end does not justify any means of achieving it. The exclusionary process cannot make unconstitutional demands upon the personnel; they cannot be required to forego the Bill of Rights for the privilege of receiving a paycheck.

E. With respect to appellant Starbuck.

The constitutional issues with respect to appellant Starbuck's dismissal are treated here separately as they raise

somewhat different issues. Appellant Starbuck was appointed pursuant to the New York Civil Service Law in a temporary capacity as indicated previously, but was dismissed without a hearing on June 18, 1964, for failing to answer the following question relating to past political beliefs and actions:

> "Have you ever advised or taught or were you ever a member of any society or group of persons who taught or advocated the doctrine that the government of the United States or of any political subdivisions thereof should be overthrown or overturned by force, violence, or any unlawful means?"

The inquiry made of Starbuck is invalid for many of the reasons which have been set out previously concerning the various provisions of the complex. However, it should be observed, that unlike those provisions, the device used is a completely retrospective query with regard to certain speech and membership in proscribed groups. Like many of the provisions of the complex it focuses on doctrine. For example:

> "Have you ever * * * taught * * * the doctrine that the Government of the United States or of any political subdivision thereof should be overthrown or overturned by force * * *".

And,

> "Have you ever advised * * * the doctrine that the Government of the United States or of any political subdivision thereof should be overthrown or overturned by force * * *".

However, unlike Section 105(3), New York Civil Service Law, membership in organizations which *advocated* or *taught* "the doctrine" that the Government of the United States or of any of its political subdivisions should be overthrown by force, is also inquired of.

It is conceded that a "yes" answer to the above inquiry would enmesh appellant Starbuck in the exclusionary me-

chanism of the statute with its operative presumptions, and it is clear that appellant Starbuck was certainly justified in refusing to answer a question whose vagueness could be construed to include numerous groups or international societies quite apart from the Communist Party which might, as one of their tenets, teach or have taught the proscribed doctrine. Apart from questions as to the scope of the word "doctrine", we are met with the question of the constitutionality of the remoteness of conduct inquired into.

It is submitted that the word "ever" and the completely retrospective query made of appellant Starbuck goes beyond the state's right of legitimate inquiry.

In a series of cases, decided by a closely divided court, the Supreme Court of the United States has upheld the power of the state to inquire into an employee's association with allegedly subversive organizations as relevant to the employee's qualifications and fitness for public employment. It has, for example, upheld the discharge of municipal employees who refused to take a statutory required disclaimer oath, *Garner v. Los Angeles,* 341 U. S. 716; and of a subway conductor who refused to answer questions relating to subversive associations under a statute which authorized discharge when reasonable grounds existed for the belief that the employees was of doubtful trust and reliability, *Lerner v. Casey,* 357 U. S. 468; and of a teacher who refused to answer similar questions, on the ground of "incompetency", *Beilan v. Board of Education,* 357 U. S. 399; and of a social worker for his refusal to answer such questions, under a statute which made refusal "insubordination", *Nelson v. Los Angeles,* 362 U. S. 1. These and other cases, however, indicate that there are constitutional limitations on the state's exercise of these powers. For example, a broad inquiry into other kinds of associations of a non-subversive character may not be made. *Sheldon*

v. Tucker, 364 U. S. 479. With respect to disclaimer oaths, the state may not indiscriminately require a disclaimer of innocent as well as knowing association, even with subversive organizations as a condition of employment. *Weiman v. Updegraff,* 344 U. S. 183. Nor may the disclaimer form be so vague that it is impossible to determine its meaning, so that it acts as an inhibition to free association of an innocent kind. *Cramp v. Florida,* 368 U. S. 278. Also the Court has indicated that in discharging an employee whether because he is found to be a subversive or because he refuses to sign a disclaimer or answer questions, the state must accord the employee procedural due process, *i.e.,* specification of charges and an opportunity to be heard. *Nostrand v. Little,* 362 U. S. 474. It follows, therefore, that while certain inquiries under specified conditions can be made, that academic freedom and other First Amendment freedoms cannot be destroyed or inhibited on the pretense of protecting the state from disloyalty.

Thus, it would be manifestly improper for the state to deny employment under a guise of alleged inquiry into qualifications where such inquiry itself invades constitutional rights. It is clear that the state does not have an absolute right of inquiry. In every instance of inquiry, the state must contend with restrictions placed upon it by the Fourteenth Amendment of the Constitution of the United States which applies to the people of the states those freedoms of speech and association embodied in the First Amendment.

The question as to whether such remote associations as are encompassed by the word "ever" can be inquired of teachers, has not been foreclosed by *Garner v. Los Angeles Board,* 341 U. S. 716. In that case, a disclaimer affidavit containing the word "ever" regarding membership in the Communist Party was upheld. The *Garner* case involved

municipal employees and the disclaimer affidavit was not so sweeping as is the one here before the Court. The affidavit there dealt only with membership. Furthermore, the oath requirement which was also upheld in that case was retrospective at most only five years.

An aspect of the *Garner* case which bears on the constitutional question before us is one that is often overlooked. The state will say that the inquiry here is merely into qualifications and that no determination of eligibility can be made prior to the answering of the question involved. The implication is that appellant Starbuck would not necessarily be discharged if he had answered the question in the affirmative. In *Garner*, the court stated at page 720:

> "Not before us is a question whether the city may determine an employee's disclosure of such political affiliation justifies his discharge."

In the present case, this Court is not confronted with the lack of information noted by the Supreme Court in *Garner*. It is plain what the results of an affirmative answer to the disclaimer question would be. In New York, affirmative disclosure of the information being elicited would result in "*prima facie* evidence of disqualification for appointment to or retention in any office or position in the service of the state or any city or civil division thereof". New York Civil Service Law, Section 105, New York Education Law, Section 3022(2).

The reason for this is that past membership in a subversive organization is "presumptive evidence that membership has continued in the absence of a showing that such membership has been terminated in good faith". Rules of the Board of Regents, Article XVIII, Section 244(2).

Thus, we are not concerned here with an initial inquiry leading to further investigation since it is clear that one

who answers the question affirmatively would have the heavy burden of bringing in substantial evidence in the very first instance. And it would not matter at what age or under what circumstances the improper activity had taken place. These are circumstances not contemplated in the *Garner* case. Every inquiry into past association is an encroachment upon rights granted by the First Amendment. Such admitted encroachments have been allowed by the Supreme Court on the theory that the interests of the State must be balanced against those of the individual. The rationale of the cases which have allowed inquiry into past associations of a public employee has been that such information was reasonably necessary to determine an employee's fitness. Can it be said that an inquiry back to a teacher's birth is necessary in order to determine his fitness? This is the latitude which the word "ever" allows. Furthermore, a heavy burden is placed on a teacher as previously mentioned, if at some time in the distant past he became a member of a group whose present day activities are proscribed. To place such a burden on a person while admittedly infringing on his constitutional rights of association and speech, cannot be accepted on the basis of an allegedly honest search into qualifications. The more remote the associations and speech looked to, the less persuasive the qualifications argument becomes.

The issue of the query to Starbuck is not controlled by *Nelson v. Los Angeles County*, 362 U. S. 1. In that case, the employee's discharge was predicated on his refusal to answer the question, "Are you a member of the Communist Party now?", *Nelson, supra*, at page 5. Neither is this issue controlled by *Lerner v. Casey*, 357 U. S. 468. In that case, Lerner refused to answer the question as to whether he was *then* a member of the Communist Party. *Lerner, supra*, at page 471. Neither is this issue controlled by *Konigsberg*

v. State Bar of California, 366 U. S. 36, or *In re: Anastaplo*, 366 U. S. 82, for the reason that in those cases the questioning was on the basis of initial inquiries which might lead to an opportunity to investigate the matter more thoroughly. It has been observed that in the present situation an affirmative answer to the query results in *prima facie* evidence of disqualification. The setting thus in which the question is asked in the present case is of a type which would of necessity severely inhibit First Amendment liberties.

Beilan v. Board of Education, 357 U. S. 399, does not control. In that case, the court upheld the dismissal of a teacher by a Pennsylvania School Board. The teacher had refused to confirm or refute information as to his activities eight years prior in certain allegedly subversive organizations. However, the Court pointed out at page 405:

> "Petitioner's refusal to answer was not based on the remoteness of his 1944 activities."

It is clear that the court felt that a substantial issue would have been raised if remoteness had been the basis of the teacher's refusal to answer. In that sense, the *Beilan* case foreshadowed the decision of this Court in the recent case of *DeGregory v. Attorney General of the State of New Hampshire*, 34 U. S. L. W. 4345. In the *DeGregory* case, the individual involved was sentenced to prison for contempt because of his refusal to answer questions concerning his alleged communist activities prior to 1957. Among the questions he refused to answer was this: "Have you ever been a member of the Communist Party?" *DeGregory, supra*, at page 4345. This Court, in reversing the contempt conviction held that there was no overriding state interest which would warrant intrusion into political and associational privacy where the information being sought was so stale as to be historical. Of course, the case before this

Court is not presented in the setting of an investigation relating to the law making function, and, the punishment for refusal to give the information in this case is not imprisonment but dismissal from employment. However, this Court has recognized in the past that the loss of one's employment can be punishment. *Cummings v. Missouri,* 71 U. S. 277 at page 320.

In fact, the denial of an opportunity to follow one's chosen profession in government service is most certainly, in any view, "punishment" of the severest form. The Supreme Court has recognized this principle, even in cases which were decided on other points of law,

> "The deprivation of any rights, civil or political, previously enjoyed, may be punishment, the circumstances depending on the causes of deprivation determining this fact. Disqualification from office may be punishment, as in cases of conviction upon impeachment. Disqualification from the pursuits of a lawful advocation * * * may also, and often has been, imposed as punishment." *Cummings v. Missouri,* 71 U. S. 277 at 320.

Furthermore, the impact of such remote associations and speech inquired of coupled with the presumptions operative where an affirmative answer is given is substantial. We are concerned here with far more than "frankness and candor" as an initial inquiry leading to further investigation. The inquiry here and the answer demanded is not made to identify but to disqualify.

The tragic feature in cases and inquiries of this type is that those whose mission it is to overthrow the government of the United States will not hesitate to swear loyalty, while men of principle may find themselves the victims of an impersonal state machinery.

The use of the word "ever" and the inquiry made of Starbuck is unconstitutional.

Additionally, the manner in which the inquiry was presented to Starbuck, indicates that it is a unique exclusionary device. Any attempt to justify the question on the ground that it is merely an inquiry into qualifications must fail as the question cannot be affirmatively answered without the individual becoming involved in the mechanism of exclusion. Furthermore, the vague language forces one to decide on penalty of perjury whether he has engaged in the proscribed conduct. Thus the state has demanded of Starbuck as was demanded of the individuals in *Speiser v. Randall,* 357 U. S. 513, that he take the first step, execution of the question. Clearly requiring the execution of an answer to the question places the burden of persuasion and proof unto appellant Starbuck, and necessarily results in a deterrence of speech which the Constitution makes free. It presumes guilt and non-employability of all state employees, presuming either that they advocate the prohibited doctrines or that they are members of the prohibited organizations. If and only if appellant Starbuck comes forward and executes the proper answer will he become a member of the favored group, the group eligible for state employment. The question is asked of all alike—the loyal and the disloyal. In other words, the question presumes non-employability and then shifts onto Starbuck, on pain of prosecution for perjury, the task of determining his own eligibility. Such a procedure is prohibited to the State, *Speiser v. Randall, supra.*

II

The complex is defective in that it: (A) shifts the burden of proof: (B) creates an invalid presumption of law: (C) bars membership in groups which do not advocate forceful overthrow of the government: (D) conditions public employment upon the surrender of appellants' right to be free from self-incrimination: (E) does not afford certain of the appellants a hearing, all in violation of due profess of law, and the First Amendment.

A. The burden of proof is shifted.

The membership portion of the statutory scheme provides that no one shall obtain or retain public employment in the State of New York who "* * * becomes a member of any society or group of persons which teaches or advocates that the government of the United States or of any political subdivision thereof shall be overthrown by force or violence or by any unlawful means," Civil Service Law, Section 105 (1)(c). See also Penal Law, Section 161 (4).

In order that the Court may more easily comprehend the arguments to be presented below, it now becomes necessary to analyze those portions of this complex of which the State is most proud. Namely, Civil Service Law, Section 105 (2), Education Law, Section 3022 (2) and Rules of the Board of Regents, Article XVIII, Section 244(2).

In justification of the proscriptions imposed by the statutes here under consideration, the state will no doubt fondly point out that the previously named sections provide ample procedural protection to anyone unfortunate to have been enmeshed within the prohibitions of the statute. It will be shown below that the state has no reason to "point with pride" as the alleged procedural safeguards will not bear critical analysis. Moreover, it is sub-

mitted that there is no basis in law for upholding substantively an unconstitutional statute merely because it is framed with procedural due process.

The sections enumerated above provide in essence that the Board of Regents shall after inquiry and notice, make a listing of organizations which it finds to be subversive in that they violate the provisions of former Section 12-A of the Civil Service Law (now, all of Section 105). It is further provided that evidence of membership in any organization so listed on or after the tenth day subsequent to the date of official promulgation of such listings shall constitute *prima facie* evidence of disqualification for appointment to or retention of any office or position in the school system. Additionally, evidence of membership in such an organization prior to the said date, shall be presumptive evidence that membership has continued in the absence of a showing that such membership has been terminated in good faith. Furthermore, once a determination of ineligibility has been made, the party declared ineligible may have a hearing in the courts at which time the person declared ineligible shall have an opportunity for cross examination. Once the party involved has presented substantial evidence contrary to the presumptions mandated by the statute, the burden of sustaining the validity of the order of dismissal or ineligibility by a fair preponderance of the evidence shall be upon the person making such order.

In discussing the procedural aspects of the statutes here involved, the Court of Appeals stated in *Thompson v. Wallin*, 301 N. Y. 476 at page 494:

> "Under subdivision 2 of the statute, no organization may be listed by the Board of Regents as subversive until 'after inquiry, and after such notice and hearing as may be appropriate'. The statute also makes it

clear that, when it appears that one who seeks to establish or retain employment in the state public school system knowingly holds membership in an organization named upon any listing for which subdivision 2 of § 3022 makes provision, proof of such membership 'shall constitute *prima facie* evidence of disqualification' for such employment. But, as was said in *Potts v. Pardee*, 220 N. Y. 431, 433, 116 N. E. 78, 79, 8 A. L. R. 785: 'The presumption growing out of a *prima facie* case * * * remains only so long as there is no substantial evidence to the contrary. When that is offered, the presumption disappears, and unless met by further proof there is nothing to justify a finding based solely upon it.' Thus the phrase '*prima facie* evidence of disqualification', as used in the statute, imports a hearing at which one who seeks appointment to or retention in a public school position shall be afforded an opportunity to present substantial evidence contrary to the presumption sanctioned by the *prima facie* evidence for which subdivision 2 of § 3022 makes provision. Once such contrary evidence has been received, however, the official who made the order of ineligibility has thereafter the burden of sustaining the validity of that order by a fair preponderance of the evidence. Civil Service Law, 12-A, subd. (d). Should an order of ineligibility then issue, the party aggrieved thereby may avail himself of the provisions for review prescribed by the section of the statute last cited above. In that view, there here arises no question of procedural due process. Reading the statute in that way, as we do, we cannot say that there is no rational relation between the legislative findings which prompted the enactment of the Feinberg Law and the measures prescribed therein to safeguard the public school systems of the state".

In *Lederman v. Board of Education*, 96 N. Y. S. 2d 466, App. Div. 2d Dept. 1950; aff'd 301 N. Y. 476, the Court stated at page 470:

"A finding pursuant to the statute (§ 3022) as to an organization and its listing, upon sufficient proof and after a hearing on notice, bears rational relation to the facts to be presumed under § 3022, subd. 2, Educa-

tion Law, namely, that the organization does unlawfully advocate overthrow of the government and that a member employee has knowledge thereof. The listing serves to apprise him of the character of the organization. The presumption in the statute is not conclusive, merely *prima facie*, and is a prescribed rule of evidence clearly within legislative competence. The presumed facts, moreover, are subject to defenses available to an employee at his own hearing.

He may deny (a) membership; (b) that the organization advocates the overthrow of the government by force; and (c) that he has knowledge of such advocacy. The disqualification referred to in § 12-A, subdivision (c), in respect to membership by an employee in a described organization, means with knowledge of the employee of its subversive character. And the burden on the whole case is to be borne by the one preferring the charges against him. Civil Service Law, § 12-A, subd. (d)."

In 1953, after the *Adler* decision, the Board of Regents of the State of New York, listed the Communist Party of the United States and the Communist Party of the State of New York as proscribed organizations. In 1958 the State Legislature adopted the findings of the Board of Regents and added a new paragraph to Section 105(3) of the New York Civil Service Law which declared that evidence of membership in the Communist Party of the United States or the State of New York shall be considered *prima facie* evidence of disqualification for employment to or retention in the service of the State of New York.

An examination of the procedure indicated previously shows that where an order of ineligibility issues against an individual on the grounds of his membership in a listed organization, it merely becomes necessary at a disciplinary hearing to establish the fact that the individual is a member of that organization. Once this is established, the individual is disqualified from public employment unless he can

present substantial evidence contradicting the facts presumed, *i.e.*, the nature of the organization or his knowledge thereof. Only if he is able to do so does the burden of proving ineligibility shift to the one issuing the order.

The obvious purpose and effect of the *prima facie* characteristic of the statute, together with the listing authority is to relieve the state from the burden of having to prove at any disciplinary hearing the major elements of its case. At any hearing only one fact need be established; membership. Having done so, the state can rest. The burden is then on the individual to rebut the presumptions created. If he is not able to do so, he is dismissed. While the state may legitimately create many presumptions, we submit that it goes beyond its limits constitutionally when it legislatively determines that the major elements of its case shall be presumed, especially in the situation here where First Amendment freedoms are at stake.

This Court must consider the fact that "evidence of membership in such an organization prior to said day shall be presumptive evidence that membership has continued, in the absence of a showing that such membership has been terminated in good faith", Rules of the Board of Regents, Article XVIII, Section 244(2). All that need be established here is past membership, no matter how remote, even to the days of one's youth. Once such fact is established, the individual involved must come forward and show that such membership is not only terminated, but terminated in good faith. Once again, the major elements of the state's case are presumed. If one ignores semantics for substance, there has been an unconstitutional shifting of the burden of proof within the holding of *Speiser v. Randall*, 357 U. S. 513.

THE REMOTENESS OF THE FINDINGS.

It has been pointed out that in 1953 certain findings were made that the Communist Party of the United States and the Communist Party of the State of New York advocated the violent overthrow of the Government of the United States and its political subdivisions. Appellants emphasized that these findings were made thirteen years ago. Yet, the presumptions for membership still remain. No account is taken of the fact that in the ensuing years, the goals and ends of the organizations listed may have changed; yet on the strength of remote findings the burden is placed on an unfortunate individual who is found to be a member of these groups. *The state need not at any disciplinary hearing prove that the organizations listed presently advocate the violent overthrow of the government.* The state need only show that the individual involved is a knowing member of the group. This is so, since under the Regents' listings, the state would be able to avoid independent proof as to the nature of the organizations. Thus, the individual involved would be faced with the onerous burden of rebutting the presumptions created. It cannot be assumed that the listed organizations continue to advocate violent overthrow thirteen years after they were listed. Counsel maintain that casting the burden of disproving such advocacy on the individual involved not only violates due process of law under the *Speiser* rationale, but is invalid as a severe deterrent upon First Amendment freedoms of association of the appellants involved here.

When we consider these added elements and the severe repercussions which will follow from dismissal, then *Speiser* assumes even more significance.

In *Speiser*, the Supreme Court struck down a California oath which infringed upon freedom of expression and which

did so by using a procedure that placed "the burdens of proof and persuasion on the taxpayer", *Speiser, supra,* at 529. "Since the entire statutory procedure, by placing the burden of proof on the claimants, violated the requirements of due process, appellants were not obliged to take the first step in such a procedure". The differences between the situation in *Speiser* and the case at bar are more apparent than real. The basic holding of *Speiser* is that when First Amendment freedoms are at stake, the burden of proof cannot be shifted to the individual. The state will tell us that the burden of persuasion in the whole case is always on the one bringing the charges. But statutory language cannot alter fact. The fact is that the major elements of the state's case are initially presumed. Only when the individual comes forward and rebuts the presumptions does the burden shift. He is guilty until he substanially shows he is not. Thus the statutes assume the guilt of an individual and assess his punishment conditionally. The rationale of *Speiser* is broad enough to cover the case at bar. *Speiser* turned on the vital importance of First Amendment freedoms and it would be remarkable if the Supreme Court were to allow that decision to become a shell by upholding systems which presume all major elements of a state's case.

B. An invalid presumption of law is created.

There is further vice in the procedure which has been set out by the State of New York. To discover it we must explore the nature of the hearing which will occur whenever an order of ineligibility issues.

It has been shown through an examination of the statutory procedure involved here as well as the interpretation of the New York courts that at any hearing, the individual

involved would have to overcome certain presumptions. However, if a professor admits that he is a member of one of the organizations which has been listed by the Board of Regents, he is thereupon automatically disqualified. As long as the presumptions remain, there can be under the language of the statute, no shifting of the burden onto the person who issued the order of ineligibility. In taking this approach, it will be noted that we do not here go into the quantum and quality of the proof. We merely analyze the statute as it stands on its face and as it has been construed by the state courts in order to ascertain how it works. Viewed in the light of how it actually works, the statute is clearly unconstitutional. It is unconstitutional for the reason that it creates an invalid presumption of law, it presumes that one who is a member of a certain organization is in agreement with its aims and goals. The statute and the constructions placed on the statute by the courts fail to take account of the fact that there can be such a thing as *innocent* knowing membership.

A professor may have joined the group to study it. Indeed, he might even agree with some of its aims while disavowing others, he might be "active" in the sense of taking part in those activities which he deems to have social significance while not taking part in other activity repugnant to his principles. He may have joined and was working within the group in order to reorientate its goals and methods. However, factors such as these under the statutes as construed by the courts of the State of New York (*Thompson v. Wallin, supra, Lederman v. Board of Education, supra*), are irrelevant, since the presumptions apply to such individuals as well as those who actually advocate violent overthrow. Thus, innocent knowing members and guilty members are penalized in the same manner.

All membership is deemed guilty membership by reason of the fact that at any hearing the only issue involved is the nature of the organization and the employee's knowledge of its ends and goals. Without benefit of trial, members of the proscribed organization are branded and stigmatized with the illegal aims of the group. It is settled; nothing further need be shown except that the individual is a knowing member of the group. And for such membership, the scholar or teacher involved, or indeed, any member of the Civil Service of the State of New York, is barred from employment in the service of the state. This is guilt by association with a vengeance.

The absurdity of such a situation can be found in examples of everyday life. All Republicans did not subscribe to the party's platform in 1964. All Democrats are not social welfare enthusiasts. Neither do all members of an ethnic group share the features of those who would caricature them.

In *Schneiderman v. United States*, 320 U. S. 118, the court stated at page 136,

> "* * * under our traditions, beliefs are personal and not a matter of mere association, and * * * men in adhering to a political party or other organization, notoriously do not subscribe unqualifiedly to all its platforms or asserted principles."

In *United States v. Brown*, 381 U. S. 437, the court, in discussing this principle, declared at page 456:

> "Just last term, in *Aptheker v. Secretary of State*, 378 U. S. 500, we held § 6 of the Subversive Activities Control Act to violate the constitution because it 'too broadly and indiscriminately' restricted constitutionally protected freedoms. One of the factors which compelled us to reach this conclusion was that § 6 inflicted its deprivation upon all members of communist organizations without regard to whether there existed any demonstrable relationship between the

characteristics of the person involved and the evil congress sought to eliminate. *id.* at 509-511."

In such a case, the fact presumed, ineligibility for public employment, does not rationally follow from the fact found: membership. Because innocent knowing membership is proscribed and, indeed, is irrelevant at any hearing, the statutes are unconstitutional.

The statutory procedures involved in this case would be defective even if it were assumed that innocent knowing membership would be a complete defense in a dismissal proceeding. We reiterate that it is not as the statutes have been construed. However, assuming such a defense were permissible, the result would be that in any dismissal proceedings, the individual involved would have to come forward and prove that in fact, his knowing membership was innocent.

This is the case since as stated previously, implicit in the entire statutory complex and in the hearing procedure is the assumption that mere membership is guilty membership.

Under this interpretation, the state's position is an admission the statutes assume the guilt of the individual involved and require him to come forward and prove that his knowing membership is innocent. This in itself indicates that the complex unconstitutionally shifts the burden of proof. See *Speiser v. Randall,* 357 U. S. 513.

In defense of this system, the state has declared that the presumptions are rebuttable and that the employee involved can rebut the presumptions with "substantial evidence". However, appellants ask this Court to reflect upon the difficulties of proving the negative. How does a university professor establish that he does not advocate vio-

lent overthrow of the government, or indeed, that the organization of which he is a member does not so advocate. This is his real burden since the advocacy of the organization has been established and since his advocacy of violent overthrow is presumed from membership. While matters of proof are generally left to the state courts, counsel submit that this Court can certainly consider such problems within the entire context of this lawsuit. These statutes, like those involved in *Cummings v. Missouri*, 71 U. S. 277, assume the guilt of the individual and assess the punishment conditionally. Thus, the statutory scheme raises an issue of fundamental significance.

The grave defect in any system which assumes an individual's guilt, is the danger that an innocent individual will not be able to bring in "substantial evidence" of his own lack of wrongdoing. It is not inconceivable that a university professor who becomes a member of a proscribed group (and in good faith accepts the proposition that he "may edit communist literature, may distribute communist literature, may even take part in communist sponsored activities or meetings", as the appellees have indicated) might have an extremely difficult time proving that his knowing membership was innocent. *Adler v. Board of Education*, 342 U. S. 485, held that an assumption of guilt does not violate due process of law where the "generality of experience" *Adler, supra,* at 495, indicates that from the fact found there is a rational relationship to the fact presumed. *Adler,* does not control on this point in the present case, since in addition to due process, we are concerned here with First Amendment rights of association. Moreover, *Adler* was decided before the Communist Party of the United States and the Communist Party of the State of New York were found to be proscribed organizations. Thus the effect of the presumption on First Amendment

freedoms of association was not so clearly defined as it is in the case at bar. Where freedom of association is at stake, we urge this Court to consider more than logic, since it has been observed that the life of the law is more than logic, it's experience and experience not only teaches that " * * * men in adhering to a political party or other organization, notoriously do not subscribe unqualifiedly to all its platforms or asserted principles", *Schneiderman, supra,* at page 136, but also that loss of employmen,t to a great many men, is considered a calamity of the first magnitude. Experience teaches, and the record in this case amply shows (Record, p. 18) that even men of courage will restrict their associations when confronted with a complex of the type before this Court.

The presumptions which the state has created will, of course, deter academic personnel and others at the State University of New York from associating themselves with any of the groups in question. This is so in view of the harsh economic consequences which would accrue to an individual who was found to be a member of the proscribed groups and who was unable to surmount the difficulty of proving his loyalty to the United States. Thus, academic freedom is seriously denied these appellants as well as others situated throughout the State University system of the State of New York. Counsel will not attempt to redefine the concept of academic freedom. Many attempts to define the concept have been made and

> "Although all of these definitions are different in phraseology and although each has its own variation of emphasis, they are all essentially the same in content. Collectively, they define academic freedom in terms of study, research, opinion, discussion, expression, publication, speech, teaching, writing and communication. To one familiar with constitutional law but who has never heard of academic freedom, these terms would instantly fall within a familiar framework, the

great and indispensable freedom which the First Amendment protects against abridgement by Congress, and which is considered so fundamental to a system of liberty and justice that it is included in the due process clause of the Fourteenth Amendment and thus made a limitation on the power of the states. Indeed, academic freedom as so defined seems to fall so naturally and readily and logically within the ambit of constitutionally protected speech and communication that it would be surprising, in fact, if academic freedom had not been brought within the scope of the First and Fourteenth Amendments.[12]'' Murphy, *Academic Freedom—An Emerging Constitutional Right,* 28 Law & Cont. Prob., at pp. 451-452.

Of course, in the context of an academic community, the protection of this bundle of First Amendment rights which is termed academic freedom, mandates that a university professor may indulge in these First Amendment freedoms without fear of state or institutional censor or discipline.

These statutes and the presumptions which they create will inhibit and deter the appellants and those of our society from joining the proscribed organizations who are in the best position to study them, namely academic personnel. Thus, academic freedom is seriously interfered with in this case. Indeed, if the organizations listed presently advocate the violent overthrow of the government, there are serious implications resulting from a policy which deters those from becoming members who would wish to change the organizations' ends and goals and reorientate them in their methods. The deterrence of this type of innocent knowing membership in the manner affected by the statutes is a matter of profound significance.

The appellees defend the presumptions which the state has created for membership in certain groups upon the strength of this Court's holding in the case of *Adler v. Board of Education,* 342 U. S. 485. As indicated earlier,

Adler did not consider the effect of the presumptions in the context of academic freedom embodied in the First Amendment rights of university personnel, and with the evolving principle of this Court that those devices which shift the burden of proof upon an individual in cases where First Amendment freedoms are at stake, are unconstitutional.

Appellants ask this Court to declare the sane and sensible rule that in any dismissal proceeding against a university professor, the state must not only prove that the organization involved has characteristics which are deemed improper, but that the individual *personally* has the characteristics deemed offensive rather than assuming these initially for membership.

It is only by forging such a rule, that academic freedom and First Amendment rights can be preserved.

C. Membership in groups which do not advocate forceful overthrow of the government is barred.

A striking feature of this complex is the fact that membership in groups which do not advocate forceful overthrow of the government is presumptive evidence of disqualification for appointment to or retention in the public service in the State of New York. This is the case because the Rules of the Board of Regents provides that:

> "* * * the Board of Regents will issue a list * * * of organizations which the Board finds to be subversive in that they * * * embrace the doctrine that the Government of the United States * * * shall be overthrown or overturned by force * * * or that they * * * embrace the * * * propriety of adopting any such doctrine * * *" Article XVIII, Section 244 (2).

This must be compared to Civil Service Law, Section 105(c) which proscribes membership in a group "* * * which * * * advocates that the Government of the United States * * * shall be overthrown by force or violence * * *".

It is apparent that the state is empowered by virtue of the Rules of the Board of Regents to proscribe membership in a larger assortment of groups than would be possible if only Civil Service Law, Section 105 (1) (c) were available.

Thus, phrased, the Rules create a presumption of disqualification for membership in groups which merely believe in the proposition that the Government of the United States shall be overturned by force. Once more, the presumption is invalid since the fact presumed does not rationally follow from the fact found.

When we consider that the Rules require a report each year on each teacher as to evidence of violation of the statutory complex, Rules of the Board of Regents, Article XVIII, Section 244(1)(b), such all encompassing authority cannot lightly be brushed aside. The Regents Rules are unconstitutional. *DeJonge v. Oregon*, 299 U. S. 353.

D. Appellants are forced to choose between possible self-incrimination or public employment.

Certain aspects of the case at bar deal with queries and disclaimers with respect to activities which the state has defined as "subversive". These activities have further been characterized felonies by New York Penal Law, Sections 160 and 161. See also, 18 U. S. C. 2385. Appellants are not asked if they have ever been *convicted* of engaging in these activities. They are asked if they have ever *committed* these acts and this is so under both the former and the new procedures. Thus, appellants are required either to incriminate themselves or suffer loss of employment. The fact that a hearing is provided when an affirmative answer is given does not relieve the danger since quite apart from the difficulty of overcoming statutory presumptions is the fact that a prosecutor would certainly not be bound by the

results of a hearing. Thus an affirmative answer would provide a "link in the chain needed in a prosecution." *Blau v. U. S.*, 340 U. S. 159 at p. 161.

The truly significant factor involved in this case is that appellants will lose their employment rights even if they choose to exercise their constitutional rights to be free from self-incrimination. (Which also now includes the Federal Right, *Malloy v. Hogan*, 378 U. S. 1.). This is so in view of the fact that this Court's decision in *Slochower v. Board of Higher Education*, 350 U. S. 551 has been severely impaired by the rather sophisticated reasoning of subsequent court decisions, see *e. g. Beilan v. Board of Education*, 357 U. S. 399; *Lerner v. Casey*, 357 U. S. 468; *Nelson v. Los Angeles*, 362 U. S. 1.

It is submitted that these decisions have nullified a basic right of all public employees and in effect placed them in a position where they must choose between their jobs and their constitutional rights. This Court is requested to re-establish the principle that no disability can be levied upon a public employee who takes advantage of rights basic to our form of government. The complex conditions public employment upon the surrender of a fundamental constitutional right and is therefore, unconstitutional.

E. The complex does not afford certain of the Plaintiffs a hearing.

(1) The new procedures.

On June 10, 1965, six days before the oral arguments in this case, the Board of Trustees of the State University of New York adopted two resolutions which declared that it would be no longer state policy to require as a condition of employment the execution of the Trustees Certificates; new

procedures for appointments were substituted. Appellants contend that while the form has changed, the substance is the same. In fact, the new procedures have the same vice which is common to the statutes involved here, namely, overbreadth. The new procedures provide that Section 105 of the Civil Service Law and Section 3022 of the Education Law and the Rules of the Board of Regents and also Section 3021 of the Education Law, are part of the terms of employment for any university teacher or scholar. This is quite clear when we note the fact that "Before any initial appointment shall hereafter be made to any position * * * in the professional service of the university * * * the officer authorized to make such appointment * * * shall send or give to the prospective appointee a statement prepared by the president concisely explaining the disqualification imposed by Section 105 of the Civil Service Law and by Section 3022 of the Education Law and the Rules of the Board of Regents thereunder, including the presumption of such disqualification by reason of membership in organizations listed by the Board of Regents." Resolution No. 65-100, Section 3. The new procedures provide that "* * * in addition to due inquiry as to the candidate's record, professional training, experience and personal qualities, [he] shall make or cause to be made such further inquiry as may be needed to satisfy him as to whether or not such candidate is disqualified under the provisions of such statute and rules". Furthermore, "Refusal of a candidate to answer any question relevant to such inquiry by such officer shall be sufficient ground to refuse to make or recommend appointment." Resolutions, *supra*, Section 3 (Appendix F).

Additionally, the Resolutions provide that anyone employed prior to the effective date of the resolution shall not be deemed ineligible for employment "solely" by rea-

son of his failure to sign the certificates required by the resolution adopted in 1956.

Thus, refusal to sign the certificate is no longer the sole basis of disqualification, but merely evidence of such. This change in emphasis does not defeat the constitutional questions raised by the certificates since, in addition to providing that certain offensive statutes are part of a professor's contract terms, the certificates provide also a manner of inquiry which is unconstitutional. Appellants here do not merely complain of the fact of disqualification for refusal to execute the certificates (now reduced to evidence of disqualification); they complain also of the broad scope of inquiry which is attempted by use of this device. Thus, the First Amendment questions raised by the certificates remain intact whether disqualification follows from a refusal to sign or not. Therefore, we ask this Court to declare the certificates unconstitutional along with the statutes, administrative rules and procedures here involved.

It should be emphasized that the new procedures provide that certain offensive statutes should be brought to the attention of a prospective teacher "*Before* any initial appointment shall hereafter be made * * *", Resolutions, *supra*, Section 3. When viewed in this manner, the exclusionary features of the complex involved here is readily apparent. A conscientious teacher when confronted with the network of interlocking, ill defined statutes with their broad prohibitions on First Amendment freedoms must decide whether he should refuse appointment or risk his career on a chance remark or by knowing conduct included but not defined in the complex.

This is an unconscionable burden to place before a prospective employee. Under the new procedures, there can be

no pretense that the statutes serve an informational purpose. They are clearly exclusionary and as such unconstitutional.

(2) The lack of a hearing.

Under the statutes of the State of New York, the new procedures, the Rules of the Board of Regents and the Board of Trustees, academic personnel accepted for a term have no right to a formal hearing in respect to non-renewal of their terms.

In Article XVIII, Section 244 of the Rules of the Board of Regents, subdivision (1) (e), the Board of Regents has declared that:

> "In proceedings against persons serving under contract and not under the provisions of the tenure law, the school authorities shall conduct such hearings on charges as they deem the exigencies warrant, before taking final action on dismissal."

Thus, the plaintiffs presently still employed at the State University will have no right to a hearing in the event they are dismissed. This is so despite the fact of Civil Service Law Section 105(2) since under the new procedures, "Refusal of a candidate to answer any question relevant to such inquiry * * * shall be sufficient ground to refuse to make or recommend appointment", Resolutions, *supra*, Section 3. Under this procedure, the appointment would be refused on grounds that the candidate had blocked an inquiry into his qualifications rather than as a disqualification under the complex. Thus, no hearing is afforded.

Additionally, with respect to appellant Starbuck, the state has taken the position that temporary state employees who are discharged for failure to subscribe an answer to the civil service question relating to subversive activities are not entitled to a hearing. Thus, right of all appellants here to a hearing is clearly in issue.

If there were no possible explanation or defense for a failure to give the information requested, then it might be said that a hearing would be unnecessary because such refusal to give the requested information would inevitably result in a conclusion of unfitness. However, there are many reasons why a professor or state employee might not want to answer which in no way would reflect on his loyalty or fitness for the job. Thus an opportunity to explain could lift the cloud of suspicion which a refusal to answer would generate. The Supreme Court has recognized the vital importance of a hearing in situations of this type.

In *Slochower v. Board of Education*, 350 U. S. 551 (1956), the issue revolved around the New York City Charter which provided for the dismissal from employment of any employee who utilized his privilege against self-incrimination to avoid answering a question relating to his conduct. The Charter provided that the dismissal was to be automatic without right to notice, charges, or hearing. Slochower, an assistant professor at Brooklyn College, a public institution, exercised his right against self-incrimination with respect to former membership in the Communist Party before a committee of the U. S. Senate. He was summarily discharged. The United States Supreme Court held that the discharge violated both substantive and procedural due process. In speaking of the procedural aspect the Court stated at page 559:

> "We hold that the summary dismissal of appellant violates due process of law."

While the substantive ground in *Slochower* has been chiseled away, the procedural ground remains intact. Indeed, the Court's concern with lack of procedural safeguards seems steadily to have increased. This can be seen in the instances where the Court has felt obligated to com-

ment upon the question even where the issue had not been raised by the parties.

In *Nelson v. Los Angeles County*, 362 U. S. 1 (1959), Globe, a municipal employee, was discharged from public employment for refusing to answer certain questions concerning subversion before a subcommittee of the House Un-American Activities Committee. A statute of the State of California made it the duty of any public employee to give such testimony. Since he was a temporary employee, Globe was denied a hearing on his discharge on the ground that he was not entitled to a hearing under the civil service rules of the county. Commenting on the procedural aspect of the case, the Court stated at page 8:

> "But petitioner here raises no such point, and clearly asserts that 'whether or not petitioner Globe was accorded a hearing is not the issue here[5]'."

In footnote 5, the Court states:

> "Nor does petitioner make any attack on the failure of California's statute to afford temporary employees such as he an opportunity to explain his failure to answer questions. It will be noted that permanent employees are granted such a privilege."

The clear inference in the *Nelson* case is that the Court would have considered the procedural question, had it been raised.

In *Nostrand v. Little*, 362 U. S. 474 (1960), two professors at the University of Washington brought an action challenging the validity of a state statute which required all public employees to subscribe to an oath that they were not subversive persons or members of the Communist Party or any subversive organizations within the meaning of the statute. Refusal to subscribe to the oath was made grounds for immediate termination of employment. The Supreme Court of the State of Washington upheld the constitutional-

ity of the statute. However, the United States Supreme Court remanded the case to the Washington Court for a determination as to whether state employees who refused to sign the oath would be entitled to a hearing. The Court used the following language at page 475:

> "One of the claims is that no hearing is afforded at which the employee can explain or defend his refusal to take the oath. The Supreme Court of Washington did not pass on this point. The Attorney General suggests in his brief that prior to any decision thereon here, 'the Supreme Court of Washington should be first given the opportunity to consider and pass upon' it."

On remand, it was stated in the Washington Supreme Court:

> "Implicit in the remand is the implication that, if we hold that such a hearing is not afforded by the Act, it is violative of due process." *Nostrand v. Little,* 361 P. 2d 551, 567 (1961).

The Court found a hearing would be required.

An appeal was again taken to the United States Supreme Court which, in a *per curiam* decision, dismissed the case for want of a substantial federal question. *Nostrand v. Little,* 368 U. S. 436 (1962).

Justice Douglas, dissenting, stated at page 436:

> "The disposition that the Court makes of the case resolves one of the questions presented by the appeal, *viz.,* that appellants are entitled to a hearing before they can be discharged for refusing to take the oath."

Justice Douglas would have considered the substantive aspects of the case as well.

It is clear from the cases that a teacher has a right to a hearing before discharge from employment where his discharge has been predicated upon his refusal to answer questions concerning alleged subversive activities. The rationale

for such a right is no doubt based upon the fact of a recognition by the United States Supreme Court of the public reaction to a dismissal from employment where questions of subversion are raised.

As was stated in *Baggett v. Bullitt*, 215 F. Supp. 439 at 452:

> "Although discharge of a state employee for failing to fulfill a condition of employment by signing the loyalty oath carries no necessary inference of disloyalty to the employee it would be ostrich-like to ignore the practical realities of a public opinion which tends to attach a stigma of disloyalty to such a discharge, a stigma which may have a profound effect on the discharged employee's future employment and social and economic status. The severe impact of such a discharge upon an employee whose refusal may be motivated by considerations unrelated to disloyalty, invokes the protection of due process with compelling force."

With such a rationale it is unlikely that the United States Supreme Court would distinguish between tenured and non-tenured teachers.

Additionally, the State has denied Appellant Keyishian, any hearing the "exigencies" might have warranted by simply allowing his term appointment to end and then refusing to renew his appointment (the result—a dismissal from employment). Counsel submit that the utilization of this procedure would nullify any hearing rights of the appellants here as well as hundreds of employees in similar circumstances throughout the state university system.

It is submitted that under the circumstances of the case at bar that the right to a hearing extends to situations where there is a refusal to renew term Appointments. The right cannot be destroyed by a change in form.

The State of New York has taken the position that Starbuck is not entitled to a hearing. Under the procedures in-

volved, the other plaintiffs are not entitled to a hearing also. Therefore, the statutes, administrative regulations and procedures are unconstitutional.

III

The complex is a bill of attainder.

Appellants submit that the statutory scheme here under attack is a bill of attainder. The complex inflicts punishment without a judicial trial, *Cummings v. Missouri,* 71 U. S. 277, 323, and is beyond the power of the New York Legislature to enact, Article I, Section 10, United States Constitution. There can be no doubt that loss of employment at a university professorial level is punishment of the severest form. When one considers the years invested in acquiring the knowledge and skill necessary to teach on a university level, it is readily apparent that the loss of so important an opportunity is a severe blow. It must be remembered that many university teachers have a skill which is not readily marketable in any other area except that of teaching. When this is coupled with the rapid assimilation of private universities into an ever growing public university, loss of an opportunity to teach at such university amounts practically to an inability to follow one's profession. While the Supreme Court left open the question as to whether or not a dismissal from state employment can constitute "punishment" in *Garner, supra,* 341 U. S. 716 at 721, it has in earlier cases indicated that the range of penalties which can be considered in bill of attainder cases is quite large. Thus the Court stated in *Cummings, supra,* at page 320:

> "The deprivation of any rights, civil or political, previously enjoyed, may be punishment, the circumstances attending and the causes of the deprivation determin-

ing this fact. Disqualification from office may be punishment, as in cases of conviction upon impeachment. Disqualification from the pursuits of a lawful advocation, or from positions of trust, or from the privilege of appearing in the courts, or acting as an executor, administrator, or guardian, may also and often has been, imposed as punishment."

Furthermore, the case of *United States v. Brown,* 381 U. S. 437 has now laid to rest the historically incorrect doctrine that bills of attainder must be retrospective.

"It would be archaic to limit the definition of 'punishment' to 'retribution'. Punishment serves several purposes: retributive, rehabilitative, deterrent—and preventive * * *

Historical considerations by no means compel restriction of the bill of attainder ban to instances of retribution." *United States v. Brown, supra,* at p. 458.

With these principles in mind, we next set out the significant portion of the complex with which we are here dealing as to this question. New York Civil Service Law, Section 105(1)(c) provides that no one shall obtain or be retained in public employment who:

" * * * becomes a member of any * * * group of persons which * * * advocates that the Government of the United States * * * or of any political subdivision thereof shall be overthrown by force or violence or by any unlawful means.

For the purposes of this section, membership in the Communist Party of the United States of America or the Communist Party of the State of New York shall constitute *prima facie* evidence of disqualification for appointment to or retention in any office or position in the service of the state or of any city or civil division thereof."

In *United States v. Lovett,* 328 U. S. 303, the court stated at pp. 315-316:

"* * * legislative acts, no matter what their form, that apply either to named individuals or to easily ascer-

tainable members of a group in such a way as to inflict punishment on them without a judicial trial are bills of attainder prohibited by the Constitution."

An analysis of the New York Statute set out above shows that there can be no pretense that the state was merely legislating with respect to general characteristics only. The Legislature has gone further than that. Having determined that certain characteristics are offensive, it has then proceeded to legislatively determine the persons who possess the offensive characteristics and who, therefore, cannot obtain or retain public employment. It is precisely this vice which the framers of the Constitution sought to avoid. The basic separation of legislative, executive and judicial functions and the whole system of checks and balances was devised to prevent concentration of power with its attended abuse. The Legislature, having taken the initiative in raising the question, enacted the standard which it then proceeded to apply. The procedure is clearly unconstitutional.

It is no argument to say that the state has merely created a rule of evidence with respect to membership in certain groups which the individual involved can rebut. The fact of the matter is that under the system as set up by the state, members of the Communist Party of the United States of America and the Communist Party of the State of New York are presumed guilty and disqualified from public employment unless they can first remove the guilt.

The Court below, in holding the complex not to be a bill of attainder, placed particular reliance upon the fact that the proscription was not based on an original determination by the State Legislature of the aims of the Communist Party but rather was based upon the findings of the Board of Regents which, after extensive hearings, listed the two organizations under Section 3022 of the New York

State Education Law (Record, pp. 285-286). Apart from the very serious questions as to whether an administrative body in its factfinding capacity is fulfilling the obligations of a "judicial trial" with respect to issues raised in bill of attainder cases, the Court's reasoning below ignores the fact that the Board of Regents listed the Communist Party of the United States and the Communist Party of the State of New York as proscribed organizations *in 1953*. A crucial constitutional factor involved here is that the State Legislature took cognizance of the listing by the Board of Regents *in 1958* and elevated the findings to the stature of statutory law. (New York Civil Service Law, Section 105(3).)

It is clear from the preamble to the amendment incorporating the reference to the two parties that the purpose of the reference was to bring Section 105 into harmony with the determination of the Board of Regents under Section 3022. New York Session Law, C. 503, Section 1 (Record, p. 299). An examination of that preamble indicates that the Legislature considered nothing other than the fact of the listing by the Board of Regents.

It seems clear, therefore, that the Legislature of the State of New York in 1958 made an original determination that the Communist Party of the United States and the Communist Party of the State of New York were organizations which fell within the prohibitions of the complex involved here. The Legislature must have found, that is, as of 1958 at least, that the organizations listed by the Board of Regents in 1953 and their members, *continued to possess the characteristics which had led to the original listing.* Thus, we had a "trial by Legislature", *United States v. Brown*, 381 U. S. 437 at 442.

It is true as the District Court stated below that:

> "The Legislature, in the first instance—in enacting § 3022 of the Education Law—did nothing more than,

> in the language of Brown, 381 U. S. at 450, 'set forth a generally applicable rule' as to the characteristics of organizations, membership in which should be evidence of disqualification." (Record, p. 287.)

However, the District Court neglected to point out that the Legislature not only set forth the generally applicable rule but applied it as well in 1958. This is what the bill of attainder clause of the Constitution precisely forbids a Legislature to do, a fact clearly recognized by this Court in *Communist Party v. Subversive Activities Control Board,* 367 U. S. 1, where it stressed the "crucial constitutional significance of what Congress did when it rejected the approach of outlawing the Party by name and accepted instead a statutory program regulating not enumerated organizations, but designated activities", 367 U. S. at 84-85.

The cases involving a State's power to legislate qualifications for a certain vocation and the rationale sustaining them are not applicable to the present situation before the Court since

> "There is nothing objectionable about the legislative establishment of appropriate qualifications for an office or vocation. In establishing qualifications, the Legislature spells out the affirmative qualities which are implied in the activity admission to which is restricted.[28] These qualifications do not exclude any designated person or class of persons; all are eligible to acquire the qualifications. The establishment of disabilities is another matter. Here the Legislature does not confine itself to reciting the requisite virtues which serve as qualifications; it specifies a characteristic which it declares to constitute a disqualification. Even here, however, the legislative action is not necessarily censorial or penal. When the Legislature declares that persons suffering from communicable diseases shall not be teachers, or that epileptics shall not drive automobiles, it is not passing judgment on those excluded. Another example is afforded by statutes which impose disabilities upon persons occupying a given position

or status because admitting them to the activity in question would expose them to a temptation to which many people would succumb. Public servants have been excluded by law from business transactions related to their official positions,[29] and from political activities;[30] railroads are forbidden by the commodities clause to haul the products of their own mines or factories,[31] certain shippers are forbidden to act as freight forwarders;[32] elaborate restrictions hedge in officers and employees of banks[33] and investment companies,[34] the directors of other concerns,[35] trustees under trust indentures,[36] and some other persons who act in a judiciary capacity. Although these disqualifications are established in terms of anticipated fault of character, there has been no legislative judgment of the particular persons. The Legislature relies upon common knowledge, that temptation leads in some cases to misconduct. Its judgment is in terms of general psychology. It is discharging the proper legislative function of establishing general rules of conduct, not the judicial function of appraising the faults of individuals.

We have a very different situation when the Legislature inquires into the character of the persons disqualified.[37] Here the disqualification results from a legislative judgment that the proscribed persons possess a characteristic not found in people in general. It rests, not upon general psychology, but upon evidence. It is a determination, judicial in nature, of culpability or blameworthiness." *Legislative Disqualifications as Bills of Attainder,* Wormuth, 4 Vanderbilt, L. Rev. 608-610 (1951).

In other words, the complex before this Court is designed to reach the person, not the calling.

The Court below stressed the fact that the disqualification was only *prima facie.* In other words, the Court indicated that an act is not a bill of attainder if it merely assumes the guilt of an individual rather than declaring it. An argument of this type was rejected by the Supreme Court in *Cummings v. Missouri,* 71 U. S. 277. In the *Cum-*

mings case, the United States Supreme Court held unconstitutional as a bill of attainder a requirement of the Constitution of the State of Missouri that individuals, in order to practice their professions, must subscribe to an oath that they had not engaged in certain designated activities.

The Court stated at pages 324-325:

> "If the clauses of the Second Article of the Constitution of Missouri, to which we have referred, had in terms declared that Mr. Cummings was guilty or should be held guilty, of having been in armed hostility to the United States, or having entered that state to avoid being enrolled or drafted into the military service of the United States and, therefore, should be deprived of the right to preach as a priest of the Catholic Church, or to teach in any institution of learning, there could be no question that the clauses would constitute a bill of attainder within the meaning of the federal constitution. If these clauses, instead of mentioning his name, had declared that all priests and clergymen within the State of Missouri were guilty of these acts, or should be held guilty of them, and hence be subjected to the like deprivation, the clauses would be equally open to objection. And, further, if these clauses had declared that all such priests and clergymen should be so held guilty, and thus be deprived, provided they did not, by a day designated, do certain specified acts, they would no less be within the inhibition of the Federal Constitution.
>
> • • •
>
> The results which would follow, from the clauses of the character mentioned, do follow from the clauses actually adopted. The difference between the last case supposed and the case actually presented is one of form only, and not of substance. The existing clauses presume the guilt of the priests and clergymen and adjudge the deprivation of their right to preach or teach unless the presumption be first removed by their expurgatory oath—in other words, they assume the guilt and adjudge the punishment conditionally. The clauses supposed differ only in that they declare the guilt instead of assuming it. The deprivation is affected

> with equal certainty in the one case as it would be in the other, but not with equal directness. The purpose of the lawmaker in the case supposed would be openly avowed; in the case existing it is only disguised. The legal result must be the same, for what cannot be done directly, cannot be done indirectly. The Constitution deals with substance, not shadows."

Thus this Court recognized almost one hundred years ago the dangers involved in a system which assumes the guilt and assesses the punishment conditionally, a danger not appreciated by the District Court below (which Court also relied in part on *Adler v. Board of Education*, 342 U. S. 485, despite the fact that the organizations were statutorily proscribed in 1958, long after the *Adler* decision).

The fact that a person can come in if he possesses substantial evidence and purge himself of the guilt cannot save this enactment from its serious constitutional defects. One may be innocent and still not be able to present "substantial evidence" of such innocence. Cummings could have signed a disclaimer oath and been eligible to practice his vocation, a procedure not quite so difficult as bringing in substantial evidence. However, the court in *Cummings*, recognized that the legislature in assuming guilt, is performing the same function of the judiciary in declaring it.

Could the New York Legislature, on the basis of facts found five years before, by an administrative body, declare that all members of the American Civil Liberties Union or of the Conservative Party of the State of New York are *prima facie* ineligible for public employment? Could the New York Legislature, on the basis of such findings and declarations require the affected individuals to come in and prove their innocence?

If the legislature is free to do this, then the concept of a *judicial* trial fades to insignificance, and the constitutional

prohibition against the bill of attainder becomes meaningless. Indeed,

> "Of what avail will be the prohibition if it can be avoided by changing a few forms?"
>
> • • •
>
> "You cannot imagine an instance of oppression, that the Constitution was designed to prevent, which may not be affected by this means." Argument for Mr. Cummings, *Cummings, supra,* at pp. 288-289.

The complex is a bill of attainder, *Cummings v. Missouri,* 71 U. S. 277; *Ex parte Garland,* 71 U. S. 333; *United States v. Lovett,* 328 U. S. 303; *United States v. Brown,* 381 U. S. 437.

IV

The complex is a prohibited *ex post facto* enactment which deters First Amendment freedoms.

A law is *ex post facto* if it punishes a citizen for an act which, when done, was in violation of no existing law, *Calder v. Bull,* 3 U. S. 386, 388; or if it alters the legal rules of evidence and receives less, or different, testimony than the law required at the time of the commission of the events, in order to convict the offender, *Calder v. Bull, supra,* page 390. Although Mr. Justice Chase in *Calder,* confined this *ex post facto* requirement in terms of criminal conduct, it is now clear that legislation which is essentially punitive cannot escape censor merely because it is cast in civil form, *Cummings v. Missouri,* 71 U. S. 277; *Ex Parte Garland,* 71 U. S. 333. Thus the test under both a bill of attainder and *ex post facto* provision is whether a legislative enactment levies "punishment" in some constitutional sense. It is clear that the Supreme Court has acknowledged that the loss of one's employment or ability to pursue his

vocation is indeed punishment since a statute depriving a person "of any rights, civil, or political, previously enjoyed may be punishment * * *", *Cummings v. Missouri, supra,* at 320. It has previously been mentioned that the statutory scheme in New York is essentially exclusive and not designed merely to elicit information. Information as to past activity in subversive groups brings into play the exclusionary mechanism of the statutes and the application of legislatively determined presumptions. It cannot be denied that the presumptions once operative present a formidable barrier to continuing employment. Past membership in proscribed groups is presumed to have continued unless termination of such membership in good faith can be shown. Clearly, to burden an employee with such a presumption for an act remote in the past, which act may have taken place prior to the enactment of the legislation is to punish that individual for innocent past acts. Indeed, such membership may have been in the 1930's when the Communist Party, for example, was just another political party, see *Cramp v. Florida,* 368 U. S. 278 at 286. To allow the projecting back of present anxieties and fears to acts which in the past were innocent presents a real danger to our liberties. The creation of the presumption here is punishment since the consequences of the presumption are substantial, as have been elaborated elsewhere in this brief. Further, the impact of this *ex post facto* enactment on First Amendment freedoms is considerable. The vice in this complex is that it creates a disability for conduct which has already taken place. To sanction such a principle leaves no speech or association of the present protected. Thus, a real element of deterence is observed. While it seems that no statute has been declared unconstitutional specifically because of its retrospective effect on freedoms of association and expression (but see *Weiman v. Updegraff,* 344

U. S. 183, 193 (1952), Black, J., concurring), the court seems to have avoided the delicate issues involved by using due process of law as a basis upon which to strike down legislation with *ex post facto* elements. See *e.g., Weiman v. Updegraff, supra,* at 191.

When considering this question, we ask this Court to take note of the fact that there is a distinction between legislation where the *ex post facto* elements create a substantial disability as in our case with the creation of presumptions and legislation where the *ex post facto* elements require compulsory revelation without specific consequences as in many employee dismissal cases. The first situation, with its officially imposed disadvantages is truly *ex post facto,* while the second, equally offensive, has its greatest impact in the area of First Amendment freedoms.

The District Court below, relying on the Supreme Court decision in *Garner v. Los Angeles Board,* 241 U. S. 716, dismissed the *ex post facto* question with the statement that:

> "The proscription of their conduct preceeded the conduct itself, so that the *ex post facto* clause does not apply" (Record, p. 284).

But the appellants here are not asked if they have engaged in proscribed activity since 1953. They are asked if they have "ever" been members of proscribed groups. An affirmative answer brings into play the presumption that they are still members and appellants are burdened with the responsibility of going forward and showing that such membership has been terminated in good faith. A failure to adequately do so results in a dismissal from public employment on the grounds of subversion as listed in Civil Service Law, Section 105. This indeed, is a high price to pay for membership which may have occurred years before

1953. It is this aspect of the case which raises the *ex post facto* issue. We deal here with more than a presumption of continuance. We deal with punishment for an act lawful when it occurred.

V

The statutes, and rules, certificates and questionnaires herein complained of are invalid insofar as they deal with matters preempted by existing federal legislation.

A large area of the complex before this court deals with activity directed towards the overthrow of the Government of the United States. For example, Civil Service Law, Section 105 makes one ineligible for public employment who:

> "* * * teaches the doctrine that the Government of the United States * * * should be overthrown * * * by force * * *"

Or who

> "prints, * * * any book * * * containing * * * the doctrine that the Government of the United States * * * should be overthrown * * * by * * * any unlawful means and who * * * embraces the duty * * * of adopting the doctrine contained therein * * *"

Or who

> "* * * helps to organize or becomes a member of any * * * group of persons which * * * advocates that the Government of the United States * * * shall be overthrown by force * * *".

Furthermore, "membership in the Communist Party of the United States of America * * * shall constitute *prima facie* evidence of disqualification * * *".

Additionally, the Regents Rules, New York Education Law, Sections 3021 and 3022 as well as Penal Law Sections 160 and 161 contain a great many references to activities

directed towards the Government of the United States and all "organized government".

In *Pennsylvania v. Nelson,* 350 U. S. 497, this Court held at p. 499:

> "* * * that the Smith Act * * * which prohibits the knowing advocacy of the overthrow of the Government of the United States by force and violence, supersedes the enforceability of the Pennsylvania Sedition Act which proscribes the same conduct."

Of course, the decision did not "* * * limit the right of the state to protect itself at any time against sabotage or attempted violence of all kinds[8]." *Pennsylvania supra* at p. 500, and neither did it affect the right of a state to investigate such activity directed *against itself Uphaus v. Wyman,* 360 U. S. 72.

However, the State under the complex at bar and by the procedures which it has utilized has gone beyond activity directed towards itself and imposed disabilities for activity which is properly the province of federal concern. Therefore, appellants maintain (See paragraph 49th of Complaint, Record p. 13) that the complex is unconstitutional insofar as it imposes punishment for conduct directed against the United States.

VI

The Doctrine of Abstention is not applicable to the case at bar.

Two cases recently decided by the United States Supreme Court have laid to rest any application of the abstention doctrine to the case at bar, *Baggett v. Bullitt,* 377 U. S. 360; *Dombrowski v. Pfister,* 380 U. S. 479.

These cases embody the principle that abstention will not be utilized where the vagueness of a state statute may interfere with first amendment freedoms. As this court has stated:

> "We also cannot ignore that abstention operates to require piecemeal adjudication in many courts * * * thereby delaying ultimate adjudication on the merits for an undue length of time * * * a result quite costly where the vagueness of a state's statute may inhibit the exercise of First Amendment freedoms." *Baggett, Supra,* at pp. 378-9.

> "Other considerations also militate against abstention here. Construction of this oath in the state court, abstractly and without reference to concrete, particularized situations so necessary to bring into focus the impact of the terms on constitutionally protected rights of speech and association * * * would not only hold little hope of eliminating the issue of vagueness but also would very likely pose other constitutional issues for decision, a result not serving the abstention justifying end of avoiding constitutional adjudication * * *" *Baggett, Supra,* at P. 378.

Appellants cannot be expected to consent that the statutes and administrative rules involved in this case are part of their contract terms based on the expectation that the courts will ultimately justify any statements they may make. This type of adjudication, "* * * affords safeguards too tenuous to neutralize the danger." *American Communications v. Douds,* 339 U. S. 382 at P. 420 (Frankfurter, J. dissenting as to vagueness).

The appellees have claimed that a state employee may teach communist theory, may write in defense of communism or may edit communist literature among other things. The language of the statutory scheme in this case does not sustain their contention, and university professors are certainly justified in their fears that a chance remark included

but not defined in the complex could have disastrous consequences on their careers. This is so especially in light of the fact that recently in another context a case was carried to the Court of Appeals of the State of New York with the sole view towards preventing a known member of the Communist Party merely from presenting a public address at the university. See *Egan v. Moore,* 14 N. Y. 2d 775, 199 N. E. 2d 842 (1964).

When we consider the large area of proscribed activities embraced by the language of this complex, it can be observed that those engaged in teaching activities in the State of New York will find it impossible to know when some action, knowingly or willfully taken, will be construed to be an act falling within the prohibitions of the complex. Such uncertainty plainly fails to meet the requirements of due process that legislation must be framed in sufficiently clear terms to permit those subject to it to know where the standards imposed will draw the line between the allowable and the forbidden. Thus, appellants are denied reasonable advance notice of the circumscribed areas *involved* and are restricted and inhibited in the area of constitutionally protected freedoms. Those inhibitions cannot be interpreted away. The statutes here are so ill-defined and complex that a state court could not reach an acceptable limiting construction short of the piecemeal adjudicaiton considered to be so harmful to First Amendment Liberties in *Baggett.*

Therefore, it is submitted, that the case at bar is not one for abstention.

Conclusion

The statutory scheme involved here is highly unique and complex. The constitutional issues involved are those which are continually rising in an age when international distrust and fear have become a way of life. See *Baggett v. Bullitt*, 377 U. S. 360, at p. 366. The state will indicate that the Government's purpose in enacting and enforcing these statutes is the elimination of those tainted with disloyality from the school system of the state. If we assume *arguendo*, that such a legitimate state need exists in the present circumstances, this purpose should not be achieved at so unbelievable a cost in liberty and principle.

It is submitted that the elimination of these statutes will in no way interfere with the state's goal of obtaining fit and competent teachers nor will it prevent the imposition of honest and legitimate qualifications for the teaching profession. Men have struggled for centuries to establish and preserve the delicate freedoms with which we are here concerned. These freedoms cannot be preserved where a public authority can demand of an individual that he make a choice between his constitutional liberties and his economic well-being. It is only too evident that confronted with such a decision, most men, reluctant though they may be, will choose to feed their families rather than make a stand. There were hundreds at the University of Buffalo who were opposed to the certificates, laws, and administrative procedures in question. Only five had the courage to stand against economic coercion. This is not to say that the stature of those who opposed the laws, but who in the end consented that they should be a part of their contract terms, should in any way be diminished. They acted from an impulse profoundly basic in any society—the impulse to preserve and maintain the economic status of their families.

The very fact that men can be forced to a choice in such a manner is reason enough for this court to hold unconstitutional the complex before it.

Respectfully submitted,

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STATUTES, ADMINISTRATIVE RULES AND CERTIFICATES INVOLVED